SUPREME COURT OF THE UNITED STATES.

No. 410.

JACOB LABER, PLAINTIFF IN ERROR;

vs.

TUNIS COOPER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-room in the city of Chicago, in the district aforesaid, before the honorable Thomas Drummond, district judge of said district, and in the absence, pro tempore, of the hon. David Davis, one of the justices of the Supreme Court of the United States, sole judge of said circuit court, on Monday, the twenty-sixth day of November, in the adjourned October term of said court, in the year of our Lord one thousand eight hundred and sixty-six, and of our independence the ninety-first year.

WM. H. BRADLEY, *Clerk*.

TUNIS COOPER
vs.
JACOB LABER. } Assumpsit.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the eighteenth day of February, in the year of our Lord one thousand eight hundred and sixty-five, came
2 Tunis Cooper, plaintiff, by his attorney, and filed in the office of the circuit court of the clerk of the United States for the northern district, of Illinois, at Chicago, in said district, his praceipe for a writ of summons against Jacob Laber, defendant; and also, at the same time, filed his bond for costs in said entitled cause, which said praceipe and bond are respectively in the words and figures following, to wit:

Praceipe.

UNITED STATES OF AMERICA, *Northern district of Illinois, ss:*

U. S. circuit court thereof, March term A. D. 1865.

TUNIS COOPER
vs.
JACOB LABER. } Assumpsit. Damages $10,000.

The clerk of said court will please issue summons as above, returnable according to law, and so oblige

LEWIS UMLAUF,
Att'y for Pl't'ff.

To Wm. H. Bradley, esq., clerk of said court.

Chicago, February, 18, 1865.

Endorsed: Filed Feb'y 18, 1865.

WM. H. BRADLEY, *Cl'k.*

3 *Bond.*

Circuit court, March term, A. D. 1865.

UNITED STATES OF AMERICA, *Northern district of Illinois, ss:*

TUNIS COOPER
vs.
JACOB LABER. } In assumpsit.

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, I hereby agree and stipulate that execution may issue against my property for any costs taxed against him.

Dated this 18th day of February, A. D. 1865.

LEWIS UMLAUF.

Endorsed: Filed Feb'y 18th, A. D. 1865.
WM. H. BRADLEY, *Clerk.*

On the same day, to wit, the 18th day of February, A. D. 1865, a writ of summons issued out of said clerk's office in said entitled cause, which said writ, together with the return of the marshal
4 thereon is in the words and figures following, to wit:

Summons.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA,
Northern district of Illinois, ss:

The United States of America, to the marshal of the northern district of Illinois, greeting:

We command you, that you summon Jacob Laber, if he shall be found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, at the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of March next, to answer unto Tunis Cooper in a plea of trespass on the case upon promises, to his damage, as he alleges, of ten thousand dollars, and have you then and there this writ.

Witness, the hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this eighteenth day of February, in the year of our Lord one thousand eight hundred and sixty-five, and of our independence the 89 year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

[50 cent revenue stamp.]

5 *Return.*

Executed this writ by reading to the within-named Jacob Laber, 22d day of Feb'y, A. D. 1865.

J. R. JONES,
U. S. Marshal,
By P. MUNSON, *Deputy.*

Endorsed: Filed Mar. 6th, A. D. 1865.
WM. H. BRADLEY, *Clerk.*

On this day, to wit, the 23d day of February, A. D. 1865, came said plaintiff, by his attorney, and filed in said clerk's office his declaration against said defendant in said entitled cause, which said declaration is in the words and figures following, to wit:

Declaration.

UNITED STATES OF AMERICA, *Northern district of Illinois, ss:*

Circuit court thereof, March term, A. D. 1865.

Tunis Cooper, a citizen and resident of the State of New York, by Lewis Umlauf, his attorney, complains of Jacob Laber, a citizen of the State of Illinois, and resident of said northern district of Illinois, in a plea of trespass on the case upon promises, for
6 that whereas the said defendant heretofore, to wit, on the sixth day of May, A. D. 1856, at said district, by name, style, and description of Jacob Laber, made his certain promissory note in writing, bearing date a certain day and year therein mentioned, to wit, the day and year aforesaid, and thereby then and there promised to pay to the Racine and Mississippi Railroad Company, a corporation and body politic, created and existing by and under the laws of the State of Wisconsin, at the office of said company, in the city of Racine, in the State of Wisconsin, to wit, at said district, five years from the tenth day of May, A. D. 1856, for value received, the sum of thirty-seven hundred dollars, together with the interest thereon at the rate of ten per centum per annum, payable annually on the tenth day of May, in each year after the date thereof, at the place aforesaid, and then and there delivered the said promissory note to the said Racine and Mississippi Railroad Company; and the said Racine and Mississippi Railroad Company, to whom or to whose order the payment of the said sum of money, in the said promissory note specified, was to be made after the making
7 of the said promissory note, and before the payment of the said sum of money therein specified, to wit, on the day and year aforesaid, at said city of Racine, to wit, at said district by Henry S. Durand, by name of H. S. Durand the then president of the said company, endorsed the said promissory note, by which said endorsement the said Racine and Mississippi Railroad Company then and there ordered and appointed the said sum of money in the said promissory note, specified to be paid to the said plaintiff.

And the said plaintiff avers, that afterward and when the said note became due and payable, accordind to the tenor and effect thereof, to wit : on the tenth day of May, A. D. 1861, at the said office of the said Racine and Mississippi Railroad Company, at said city of Racine, to wit : at said district, the said promissory note was duly presented and shown for payment thereof, and payment for the said sum of money therein specified was then and there duly required, according to the tenor and effect of the said promissory note, but
8 that neither the said Racine and Mississippi Railroad Company, nor the said defendant, nor any other person or persons on behalf of the said defendant, did or would at the said time when the said promissory note was so presented and shown for payment thereof as aforesaid, or at any other time, before or afterwards, pay the said sum of money therein specified, or any part thereof, but wholly neglected and refused so to do, of all which said several premises the said defendant afterwards, to wit : on the day and year last aforesaid at the district aforesaid had notice. by means whereof, and by force of the statue in such case made and provided, the said defendant then and there became liable to pay to said plaintiff the said sum of money in the said promissory note specified, when he, the said defendant, should be thereunto afterwards requested, and being so liable, he, the said defendant, in consideration thereof, to wit : on the day and year last aforesaid, at the district aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said promissory
9 note specified when he, the said defendant, should be thereunto afterwards requested.

Whereas, also the said defendant heretofore, to wit, on the sixth day of May, A. D. 1856, at said district by name, style and description of Jacob Laber, made his certain instrument of writing bearing date a certain day and year therein mentioned, to wit : the day and year in this count aforesaid, and thereby then and there promised to pay to the Racine and Mississippi Railroad Company, a corporation and body politic, created and existing by and under the laws of Wisconsin, at the office of said company in the city of Racine, in the State of Wisconsin, to wit : at said district, five years from the tenth day of May, A. D. 1856, for value received, the sum of thirty-seven hundred dollars with interest thereon, at the rate of ten per centum per annum, payable annually on the tenth day of May in each year after the date thereof at the place aforesaid, and then and there delivered the said instruments of writing to the said Racine and Missis-
10 sippi Railroad Company, and the said Racine and Mississippi Railroad Company, to whom or to whose order the payment of the said sum of money in the said instrument of writing specified was to be made, after the making of the said instrument of writing and before the payment of the said sum of money therein specified, to wit : on the day and year aforesaid, at said city of Racine, to wit : at said district, by Henry S. Durand, by name of H. S. Durand, the then president of the said company, endorsed the said instrument of writing by which said endorsement the said Racine and Mississippi

Railroad Company then and there ordered and appointed the said sum of money in the said instrument of writing specified to be paid to the said plaintiff, and the said plaintiff avers that afterwards and when the said note became due and payable according to the tenor and effect thereof, to wit: on the 10th day of May, A. D. 1861, at the said office of the said Racine and Mississippi Railroad Company, at said city *city* of Racine, to wit: at said district, the said instrument of writing was duly presented and shown for payment
11 thereof and payment of the said sum of money therein specified was then and there duly required, according to the tenor and effect of the said instrument of writing, but that neither the said Racine and Mississippi Railroad Company, nor the said defendant, nor any other person or persons on behalf of the said defendant, did or would at the said time when the said instrument of writing was so presented and shown for payment thereof as aforesaid, or at any other time before or afterwards, pay the said sum of money therein specified or any part thereof, but wholly neglected and refused so to do, of all which said several premises the said defendant afterwards, to wit: on the day and year in this count last aforesaid at the district aforesaid had notice, by means whereof, and by force of the statute in such case made and provided, the said defendant then and there became liable to pay to the said plaintiff the said sum of money in the said instrument of writing specified when he, the said defendant, should be thereunto afterwards requested; and being
12 so liable, he, the said defendant, in consideration thereof, to wit: on the day and year in this count aforesaid, at the district aforesaid, undertook, and then and there faithfully promised the said plaintiff to pay him the said sum of money in the said instrument of writing specified, when he, the said defendant, should be thereunto afterwards requested.

And whereas, also the said defendant, to wit, on the day and year last aforesaid at the district aforesaid was indebted to the said plaintiff in the further sum eight thousand dollars for money by the said plaintiff before that time lent and advanced to, and paid, laid out and expended for the said defendant at his special instance and request, and also in the further sum of eight thousand dollars for other money by the said defendant before that time had, and received to, and for the use of said plaintiff, and being so indebted, he, the said defendant in consideration thereof, afterwards, to wit, on the day and year aforesaid, at the district aforesaid, undertook and
13 then and there faithfully promised the said plaintiff to pay him the said several sums of money in *in* this count mentioned, when he, the said defendant, should be thereunto afterwards requested.

And whereas, also the said defendant afterwards, to wit: on the day and year last aforesaid, at the district aforesaid, accounted with the said plaintiff of and concerning divers other sums of money from the said defendant to the said plaintiff before that time due and owing, and then in arrear and indebted to the said plaintiff in the further sum of eight thousand dollars, and being so found in ar-

rear and indebted, he, the said defendant, undertook, and then and there faithfully promised the said plaintiff to pay him the said sum of money in this count mentioned, when he, the said defendant, should be thereunto afterwards requested.

Nevertheless, the said defendant, not regarding his said several promises and undertakings, has not as yet paid the said several
14 sums of money, or any or either of them, or any part thereof to the said plaintiff, although often requested so to do, but the said defendant to pay him the same has hitherto wholly neglected and refused, and still does neglect and refuse, to the damage of the said plaintiff of ten thousand dollars, and therefore he brings suit, etc.

LEWIS UMLAUF,
Att'y for Plaintiff.

Copy of promissory note and instrument in writing sued on.

Know all men by these presents that I, Jacob Laber, of the town of Rock Grove in the county of Stephenson and State of Illinois being justly indebted to the Racine and Mississippi Railroad Company in the sum of thirty-seven hundred dollars for value received, do hereby promise to pay the said Racine and Mississippi Railroad Company, or order, the sum of thirty-seven hundred dollars at the expiration of five years from the tenth day of May, A. D. 1856, together with interest thereon, at the rate at ten per cent. per
15 annum, payable annually on the 10th day of May, in each year after the date hereof, principal and interest payable at the office of said company in the city of Racine in the State of Wisconsin.

In witness whereof, I have hereunto set my hand this sixth day of May, in the year of our Lord one thousand eight hundred and fifty-six.

JACOB LABER.

Jacob Laber, dr. to Tunis Cooper:

For money advanced, paid, laid out, and expended for said defendant $8,000
For moneys had and received for use of plaintiff $8,000

Endorsed: Filed Feb'y 23d, 1865.

WM. H. BRADLEY, *Cl'k.*

On this day, to wit, the 8th day of March, A. D. 1865, came said defendants by his attorney, and filed in said clerk's office his plea in said entitled cause. Which plea is in the words and figures following to wit:

Plea.

UNITED STATES OF AMERICA, *Northern district of Illinois, ss:*

16 TUNIS COOPER
vs.
JACOB LABER.

And now comes the said defendant, by Jameson and Hibbard, his attorneys, and defends the wrong and injury, when he and says that he did not undertake or promise in manner and form as the said plaintiff hath above thereof complained against him; and if this be, the said defendant puts himself upon the country, &c.

JAMESON & HIBBARD,
Def't's Att'ys.

And said plaintiff does the like by his attorney.

LEWIS UMLAUF.

Endorsed: Filed Mar. 8, 1865.

WM. H. BRADLEY, *Cl'k.*

On this day, to wit, the 25th day of May, in the adjourned May term, A. D. 1865, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

TUNIS COOPER
vs.
JACOB LABER. } Assumpsit.

17 On motion of the defendant, by his attorney, leave is given him by the court to file special pleas herein.

On this day, to wit, the 7th day of June, A. D. 1865, came said defendant, by his attorneys, and filed in said clerk's office his special pleas in said entitled cause, which said plea is in the words and figures following, to wit:

UNITED STATES OF AMERICA, *Northern district of Illinois, ss:*

Circuit court of March term, A. D. 1865.

TUNIS COOPER
vs.
JACOB LABER. } Assumpsit.—Special plea.

And for a further plea in this behalf, leave of the court for that purpose first had and obtained to the first and second count in the said declaration contained, the said defendants says that the said plaintiff ought not to have or maintain their aforesaid action thereof against him, because he says that on the sixth day of May, in the year of our Lord eighteen hundred and fifty-six, at the county
18 of Stephenson, and State of Illinois, he, the said defendant,

made the promissory note in the said first and second count of the said declaration mentioned, and also made, executed, and acknowledged a mortgage, whereby was mortgage to secure the payment of said note, according to the tenor and effect thereof, certain real estate of the said defendant lying in said Stephenson county, and in the said mortgage particularly described, and then and there delivered the same to "the Racine and Mississippi Railroad Company," a corporation created by, and organized under, the laws of the State of Wisconsin, in full and absolute payment for thirty-seven shares of the capital stock of the said corporation, of one hundred dollars each share, and the same were taken and accepted by the said corporation as full and absolute payment of the said shares of stock under and pursuant to an agreement then and there, to wit, on the day and year and at the place last aforesaid, made and entered into by and between the said defendant and the said corporation, wherein and whereby it was agreed that the said defendant should subscribe to and for the said thirty-seven shares of capital
19 stock in the said corporation, and that the said defendant should make full and absolute payment of said stock with such—his note and mortgage as aforesaid—both of which the said defendant then and there, to wit, on the day and year and at the place last aforesaid, did, and in and by the said corporation, that it should issue to the said defendant its full paid certificates for said stock, and that it would and should pay the interest upon the said promissory note according to the tenor and effect thereof; and that the said corporation would and should, also, save the said defendant harmless from the payment of the said interest.

And the said defendant further, in fact, saith that he, the said defendant, was induced to, and did, enter into the last aforesaid agreement, and was induced to, and did, subscribe to the said capital stock, and for the said thirty-seven shares of stock; and was induced to, and did, make and deliver the said promissory note and mortgage to said corporation, as aforesaid, in full and absolute payment for the said shares of stock, and was induced
20 to and did take therefore the said promise and undertaking or agreement of the said corporation; that it, said corporation would and should make and issue to the said defendant, its full paid certificates of stock for the said thirty-seven shares of stock, and that it, said corporation, should and would as aforesaid, pay the interest upon the said note as the same matured, according to the tenor and effect thereof; and that it, the said corporation, would and should save the said defendant harmless from the payment of the said interest, by the representations made by said corporation through its agents, that the said corporation had before that time consolidated its capital stock with the capital stock of the "Rochton and Freeport Railroad Company," a corporation created by and organized under the laws of the State of Illinois, having power and authority to create, construct, equip, and operate a railroad from the State line at Beloit to Freeport, in the county of Stephenson, in said State of Illinois; and that it, said corporation, had also consolidated its

21 capital stock with the capital stock of the "Savannah Branch Railroad Company," another corporation created by and organized under the laws of said State of Illinois, and that said corporation had power and were authorized to locate, construct, equip, and operate a railroad from the city of Racine, on Lake Michigan, in the county of Racine, in the said State of Wisconsin, to said Beloit, and from thence by way of said Freeport to Savanna, in the county of Carroll, by way of Mount Carroll, in said Carroll county, and that said corporation then had a railroad completed and running from said city of Racine some forty miles towards Beloit, and nearly ready for the iron all the way to said Beloit, and that the same was all paid for, and that said corporation was out of debt and did not owe a dollar; and that said company had done and were going to do everything upon the ready cash-pay principle, and that in that way said corporation had constructed and carried on its works at very low prices, and that the said company were then receiving from the operations of the railroad which it then had completed large sums
22 of money and sufficient to pay the stockholders thereof over ten per cent. per annum, and that said corporation then had subscribed to its capital stock by responsible persons along the line of their said railroad over six hundred thousand dollars; and that said corporation then had on hand sufficient funds to complete the said railroad to said Beloit, and a surplus of one hundred and thirty-three thousand dollars after the completion of the railroad of said corporation to said Beloit, and that said corporation had issued no bonds, and had not mortgaged any of its property or a foot of its railroad, and that said corporation wished the said defendant and others in said State of Illinois, and along the line and in the vicinity of the said proposed railroad in said Stephenson, Carroll, and Jo Davies counties, to take and subscribe to the capital stock of the said corporation to enable said corporation to complete said railroad to Savanna, so that said corporation would carry away for the farmers their next crop, and that said corporation would assume and
23 pay the interest as the same should accrue on such notes and mortgages as should be given to said corporation in payment for its capital stock; and that such stock could be subscribed and paid for in notes secured by mortgage upon real estate; and that every dollar realized by said corporation from such notes and mortgages should by said corporation be faithfully applied to the construction of said railroad from said Freeport to said Savanna. And the said defendant further in fact saith, that each and all of the aforesaid statements and representations of the said corporation by and through its agents were false and unfounded in fact, and were made for the said purpose of deceiving and defrauding the said defendant out of his aforesaid note and mortgage, and that thereby the said defendant was deceived and defrauded out of his said promissory note and mortgage. And the said defendant further in fact saith, that he, the said defendant, had no knowledge or information as to the facts so as aforesaid represented other than that derived from the said repre-
24 sentations; and that when as aforesaid the same were made, and

when he made and delivered his said note and mortgage, and when he so as aforesaid entered into the said agreement with the said corporation, and when he was induced by them to subscribe, and when he so subscribed to said capital stock to the amount of the said thirty-seven shares, he believed the said facts, and every of them, to be as aforesaid represented. And the said defendant, further in fact, saith that when the aforesaid representations were made as aforesaid, and when the said defendant entered into the aforesaid agreement as aforesaid, and when as aforesaid he subscribed to the said capital stock, to the number of shares aforesaid, and when as aforesaid he made and delivered his said promissory note and mortgage in full and absolute payment for the said stock, the said corporation had not consolidated its capital stock with the capital stock of the Rocton and Freeport Railroad Company aforesaid, nor with the Savanna Branch Railroad Company aforesaid; nor had the said corporation at that time, nor
25 at any time the power or authority to locate, construct, equip, and operate a railroad from said Beloit, by way of said Freeport and Mount Carroll, to said Savanna, not to take full payment for its capital stock in notes and mortgages, or in either, nor to make the agreement which as aforesaid it did make with the said defendant, nor to locate, construct, equip, and operate any railroad anywhere within the limits of said State of Illinois; nor had said corporation at the said last aforesaid time a railroad completed and running from the said city of Racine, some forty miles, nor twenty miles, towards said Beloit, and nearly nor half ready for the iron all the way to said Beloit, nor was the same all nor near all paid for; and the said company was then largely in debt, and to such an extent as to be wholly unable to pay its indebtedness, and was then insolvent, all its property, effects, and moneys not then being sufficient nor near sufficient to pay and satisfy the indebtedness and liabilities of the said corporation; and the said corporation, before the time last aforesaid
26 to secure six hundred and eighty thousand dollars of its bonds, to that amount issued by said corporation, and then wholly unpaid, had mortgaged its entire line of railroad from the said city of Racine to said Beloit, together with all its depots and station grounds, and all its buildings and superstructures of every kind and character, and all its side tracks and turn-outs, and all other its railroad fixtures and appurtenances, and all its locomotives, engines, tenders, and cars of every kind and description, and also the franchise of said corporation, and which mortgage was in full force and effect, and a lien upon the property therein described and thereby mortgaged, and the said mortgaged property was not, at the time last aforesaid, worth the amount of money for which the same was mortgaged as aforesaid; nor was the said corporation then, to wit, at the time last aforesaid, receiving, nor at any time prior thereto had said corporation been receiving large sums of money from the operations of its said completed railroad sufficient to pay ten per cent., nor any per cent., per annum to its stockholders; nor was there then, to wit, at the
27 time last aforesaid, subscribed to the capital stock of said corporation by responsible persons along the line of the railroad

of said corporation, or elsewhere, the sum of six hundred thousand dollars, nor so much as three hundred thousand dollars; nor had the said corporation then, to wit, at the time last aforesaid, on hand sufficient funds to complete said railroad to said Beloit, nor one-fourth the funds necessary for that purpose.

And the said defendant in fact further saith, that at the time last above mentioned, the stock of said corporation had no market value, and never had had any market value, and since then never has had and now has not any market value; and the stock so as aforesaid subscribed for by the said defendant to the amount of thirty-seven hundred dollars, hath not now and never has had at any time any market value, but always has been and now is wholly without value.

And the said defendant further in fact saith, that said cor-
28 poration never has to this time constructed any railroad from said Freeport to said Savanna. And the said defendant further in fact saith, that the said corporation never at any time, by order or resolution of its board of directors, or otherwise, authorized or empowered any person or persons, officer or officers whomsoever, to assign the aforesaid promissory note, by any endorsement thereon or otherwise, and that said corporation has never assigned said promissory by any endorsement thereon or otherwise, and that if the same is assigned in form in any way, such assignment is wholly void for want of power in any person or persons, or officer or officers whomsoever, to make any assignment thereof. And the said defendant further in fact saith, that the said plaintiff is not a bona fide holder of the said promissory note, and that at and prior to the time when he the said plaintiff become possessed of the said promissory note, he the said plaintiff had notice and was informed that the said note so as aforesaid had been fraudulently and without consideration
29 obtained from the said defendant, and that the said defendant had a solid defence thereto.

And the said defendant further in fact saith, that the said promissory note in this plea mentioned is the same promise and undertaking in the said first and second count of the said declaration of the said plaintiff above-mentioned, and this the said defendant is ready to verify.

Wherefore, the said defendant prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against the said defendant, &c.

J. H. KNOWLTON,
Of Counsel.
LYMAN S. DE WOLF,
Atty. for Defendant.

UNITED STATES OF AMERICA,
Northern district of Illinois, ss:

Circuit court, June 7th, A. D. 1865.

Jacob Laber, the defendant above-named being duly sworn according to law, deposeth, that the foregoing plea has been read to him,

and that he knows its contents, and that the said plea is true in substance, and in fact, and further saith not.

Sworn and subscribed before me, this 7th day of June, A. D. 1865.

JACOB LABUR.
E. A. DRUMMOND,
U. S. Com'r.

Endorsed: Filed June 7th, 1865.

WM. H. BRADLEY, *Cl'k.*

30 On this day, to wit, the 8th day of June, A. D. 1865, came said plaintiff, by his attorney, and filed in said clerk's office his motion in said entitled cause, which said motion is in the words and figures following, to wit:

Motion.

UNITED STATES CIRCUIT COURT,
Northern district of Illinois, ss:

May term thereof, A. D. 1865.

TUNIS COOPER
vs.
JACOB LABER. } Assumpsit.

And now the said plaintiff, by his attorney, comes and moves the court to have defendant's special plea, secondly in this cause pleaded, stricken from the files for the reasons and upon the grounds following:

(1.) The said plea is not entitled of the term in which it was filed.

(2.) The said plea was filed without leave of court one day before said cause was called for trial, and takes plaintiff by surprise.

(3.) Defendant moved for a continuance of this cause, on the 25th day of May, 1865, upon affidavit, his application the court refused, but gave leave to defendant to file a special plea to traverse
31 the fact of the endorsement of the note herein sued on, that he might subpœna for witness, Henry S. Durand, the president of said corporation to which said note was made, to prove the fact of non-endorsement of said note to plaintiff.

Defendant did not file such plea nor has he subpœnaed the said witness.

(4.) The said plea on file, has been filed upon the strength of defendant's affidavit for a continuance, filed June 7th instant, and without leave of court.

(5.) The affidavit last aforementioned does not state that the existence of the facts therein stated are newly discovered, and is not sufficient to entitle defendant to a continuance.

(6.) The said plea filed raises different issues, and if good must necessarily operate as a continuance of this cause.

LEWIS UMLAUF,
Pltffs. Atty.

Endorsed: Filed June 8, 1865.

WM. H. BRADLEY, *Cl'k.*

On this day, to wit, the 10th day of June, A. D. 1865, came said plaintiff, by his attorney, and filed in said clerk's office his
32 demurrer in said entitled cause, which said demurrer is in the words and figures following, to wit:

Demurrer.

UNITED STATES CIRCUIT COURT,
Northern district of Illinois, ss:
May term thereof, A. D. 1865.

TUNIS COOPER
vs.
JACOB LABER. } Assumpsit.

And the said plaintiff, as to the said plea of the said defendant, by him secondly above pleaded, saith that the same and the matters therein contained, the manner and form as the same are above pleaded and set forth, are sufficient in law to bar or preclude him, the said plaintiff, from having or maintaining his aforesaid action thereof against him, the said defendant, and that he, the said plaintiff, is not bound by law to answer the same, and this he, the said plaintiff, is ready to verify.

Wherefore, by reason of the insufficiency of the said plea in this behalf, the said plaintiff prays judgment and his damages, by reason of the not performing of the said several promises and undertakings in the said declaration mentioned, to be adjudged to him, etc.

And the said plaintiff states and shows to the court here
33 the following causes of demurrer to the said second plea, that is to say—

1. The said plea is double in this, that it presents more than one certain and distinct issue.

2. The said plea is multifarious in this, that it presents several certain and distinct issues, to wit:

(*a.*) Want of consideration.
(*b.*) Failure of consideration.
(*c.*) Plea of fraud.
(*d.*) Denial and traverse of the back of the endorsement of said note by the payee thereof.

3. That the verbal agreements made, and understandings had, by and between the maker and payee of said note, before and at the time of its execution and delivery, and which did not enter into said note in writing, and appearing upon the face thereof, in substance and effect, denying, contradicting, or varying the legal tenor and effect

of said note, or any part thereof, cannot at law be set at against the payee of said note, nor against his assignee to deny, change, or vary the legal tenor and effect of the said note.

4. The said plea contains no averments that the said fraudulent representations of the said agent of the said payee (the said payee being a corporation aggregate) were authorized by said payee
34 or corporation to be so made, nor does said plea contain any averment that if the said agent was authorized by said corporation to make said representation, the said payee knew said representations to be false when made.

5. A plea of fraud should aver a scienter. No such averment is contained in the said plea.

6. The fraudulent misrepresentations alleged in said plea, are not sufficient, nor such as constitute such fraud and circumvention in the obtaining the execution of said note, as contemplated by the statute of Illinois.

7. The acceptance by defendant of said 37 shares of capital stock in the Racine and Mississippi railroad, is a valid consideration for said note, although said stock may never have had any marketable value.

8. When said defendant purchased said 37 shares of said capital stock, and gave therefor the said note in payment, he was bound to observe the rule of law of caveat emptor.

9. The said represention of facts, made by the agent of payee, were of such a nature which would, should have induced an ordinarily prudent man to put himself upon inquiry, were such facts in pais, wholly extrinsic, so ordinary, open, accessible, and conven-
35 ient to inquiry and investigation, that the omission by defendant of exercising ordinary diligence, care, and prudence in that behalf, is in law such a wrongful act on the part of defendant, of which he cannot take advantage.

10. A president of a railroad corporation, virtute officii, has the power to endorse and negotiate negotiable papers in the usual and ordinary course of business of such corporation, without the special authority by resolution of such corporation; and if he had the authority to so generally endorse and negotiate negotiable papers, then his endorsement of this particular note, is, by intendment, upon the ground of public and commercial policy, the act of the corporation, and bound by it, unless the endorsee had actual notice of the want of power in the president to negotiate or endorse this particular note; and the resolutions of such corporation not conferring upon its president such power, or specially prohibiting him from the exercise thereof, is not notice to endorsee. The resolutions of a corporation do not have the effect as its charter or a public statute.

11. The said plea is in other respects uncertain, informal, and insufficient.

36 LEWIS UMLAUF, *Pl'ff's Attorney.*

Endorsed: Filed June 10, 1865.

WM. H. BRADLEY, *Cl'k.*

On this day, to wit, the 14th day of June, in the adjourned May term, A. D. 1865, of said court, in the record of the proceedings in said entitled cause is the following entry, to wit:

TUNIS COOPER
vs.
JACOB LABER. } Assumpsit.

Court having considered, and being now fully advised upon the demurrer of the plaintiff to the special plea of the defendant filed herein, sustaining said demurrer, and on motion of the defendant, by his attorney, the time is extended until the twenty-fifth day of June instant, in which to file amended pleas herein.

On this day, to wit, the 26th day of June, in the adjourned May term, A. D. 1865, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

TUNIS COOPER
vs.
JACOB LABER. } Assumpsit.

37 On motion of the defendant by his attorney, the time to file special pleas herein is further extended one week.

On this day, to wit, the 1st day of July, A. D. 1865, came said defendant, by his attorney, and filed in said clerk's office his plea in said entitled cause. Which said plea is in the words and figures following, to wit:

Amended plea.

UNITED STATES OF AMERICA:

Circuit court of the United States, for the northern district of Illinois.—Of term, 1865.

TUNIS COOPER
vs.
JACOB LABER. } Assumpsit.

And for a further amended plea in this behalf, leave of the court for that purpose first had and obtained, the said defendant says, that the said plaintiff ought not to have or maintain his aforesaid action thereof against him, the said defendant, by reason of anything contained in the first and second counts of the declaration of the said plaintiff, because he, the said defendant says, that on the day
38 of the date of the promissory note in the first and second counts of the declaration of the said plaintiff mentioned, he, said defendant, made, executed and acknowledged a mortgage, whereby was mortgaged to secure the payment of the said promissory note, according to the tenor and effect thereof, certain real estate then owned by the said defendant, lying and being situate in the county of Stephenson, in the State of Illinois, and in the said mortgage particularly described, and then and there delivered the

same, with the said promissory note to "the Racine and Mississippi Railroad Company" the mortgage in said mortgage named, a corporation created by and organized under the laws of the State of Wisconsin, in full and absolute payment of thirty-seven shares of the capital stock of said corporation of one hundred dollars each share, and the same were taken and accepted by the said corporation as full and absolute payment of the said shares of stock, under and pursuant to an agreement then and there, to wit, on the day of the date of the said promissory note made and entered into by and be-
39 tween the said defendant and the said corporation, wherein and whereby it was agreed that the said defendant should subscribe to and for the said thirty-seven shares of capital stock of the said corporation, and that the said defendant should make full and absolute payment of said stock, with such his promissory note and mortgage as aforesaid, both of which the said defendant then and there, to wit, on the day of the date of the said promissory note did, and in and by the said agreement it was also agreed by the said corporation that it *it* should issue to the said defendant its full paid certificate for said stock, and that it would and should pay the interest upon the said promissory note according to the tenor and effect thereof. And that the said corporation would and should save the said defendant harmless from the payment of the said interest.

And the said defendant further in fatct saith, that he, the said defendant, was induced to, and did enter into the last aforesaid agreement, and was induced to and did subscribe to the said capital stock, and for the said thirty-seven shares of stock, and was induced to, and did make and deliver the said promissory note
40 and mortgage to said corporation as aforesaid, in full and absolute payment for the said shares of stock, and was induced to, and did take therefor the said promise, and undertaking or agreement of the said corporation, that it, said corporation, would and should make and issue to the said defendants its full paid certificates of stock for the said thirty-seven shares of stock, and that it, said corporation, should and would as aforesaid pay the interest upon the said note as the same matured, according to the tenor and effect thereof, and that it, the said corporation, would and should save the said defendant harmless from the payment of the said interest, by the representations made by the said corporation, through its agents, that the said corporation had before that time consolidated its capital stock with the capital stock of "the Rochton and Freeport Railroad Company," a corporation created by and organized under the laws of the State of Illinois, having power and authority to locate, construct, equip, and operate a railroad from the State line at Beloit to Freeport, in the county of Stephenson, in said State of
41 Illinois, and that it, said corporation, had also consolidated its capital stock with the capital stock of the Savanna Branch Railroad Company, another corporation created by and organized under the laws of said State of Illinois, and that corporation had power and authority to locate and operate a railroad from the city of Racine, on lake Michigan, in the county of Racine, in the state of Wisconsin, to said Be-

loit, and from thence by way of Freeport and Mount Carroll to Savanna, in the county of Carroll, in said State of Illinois, and that said corporation then had a railroad completed and running from said city of Racine, some forty miles towards said Beloit, and nearly ready for the iron all the way to Beloit, and that the same was all paid for, and that said corporation was out of debt and did not owe a dollar, and that said company had done and were going to do everything upon the ready cash pay principle, and that in that way said corporation had constructed and carried on its works at very low prices, and that said company were then receiving from the operations of the rail-
42 road, which it then had completed, large sums money, and sufficient to pay the stockholders thereof over ten per cent. per annum, and that said corporation then had subscribed to its capital stock, by responsible persons along the line of their said railroad, over six hundred thousand dollars; and that said corporation then had on hand sufficient funds to complete the said railroad to said Beloit, and a surplus of one hundred and thirty-three thousand dollars after the completion of the railroad of said corporation to said Beloit, and that said corporation had issued no bonds and had not mortgaged any of its property or a foot of its railroad, and the said corporation wished the said defendant and others in said State of Illinois, and along in the vicinity of the said proposed railroad in Stephenson and Caroll counties, to take and subscribe to the capital of stock of the said corporation, to enable said corporation to complete said railroad to Savanna, so that the said corporation could carry away for the farmers their next crop; and that said corporation would
43 assume and pay the interest on the notes given in payment of such subscribed stock to said corporation, and that such stock could be subscribed and paid for in notes secured by mortgage upon real estate in said State of Illinois; and that every dollar realized by said corporation from such notes and mortgages, should by said corporation be faithfully applied to the construction of said railroad from said Beloit to Savanna, by way of Freeport and Mount Caroll aforesaid.

And the said defendant further in fact saith, that said corporation authorized its agents to make the aforesaid statements and representation as they did.

And the said defendant further in fact saith, that each and all of the aforesaid representations and statements of the said corporation, and by it as aforesaid made by and through its agents, were false and unfounded in fact, and were made for the purpose of deceiving and defrauding the said defendant out of the aforesaid note and mortgage, and that thereby the said defendant was deceived and defrauded
44 out of the said promissory note and mortgage.

And the said defendant further in fact saith, that he the said defendant had no knowledge or information as to the facts so as aforesaid represented, other than that derived from the said representations; and that when as aforesaid the same were made, and when he entered into the aforesaid agreement, and when he as aforesaid subscribed for the said thirty-seven shares of stock, and when as aforesaid

he executed and acknowledged the said mortgage, and when as aforesaid he delivered to the said corporation the aforesaid promisssory note and mortgage, he, the said defendant, believed the said represented facts and every of them to be true and as represented.

And the said defendant further in fact saith, that when the aforesaid representations were made as aforesaid, and when the said defendant was thereby induced to and did enter into the aforesaid agreement with the said corporation, and when as aforesaid, he subscribed to the said capital stock for the number of shares aforesaid, and
45 when as aforesaid he, the said defendant, made and delivered to the said corporation his aforesaid note and mortgage, in full and absolute payment for the said stock as aforesaid, the said corporation had not consolidated its capital stock with the capital stock of "the Rochton and Freeport Railroad Company," and with the capital stock of "the Savanna Branch Railroad Company," nor with either of said two last-named companies; nor had the said corporation at that time, nor at any time, the power and authority to locate, equip, and operate a railroad from said Beloit to said Savanna by way of Freeport and Mount Carroll, or elsewhere in said State of Illinois; nor had said corporation the power or authority to take full payment for its capital stock in notes and mortgages, nor in either, nor to make the agreement which as aforesaid it did with the said defendant; nor had the said corporation at the time of the delivery of the said note and mortgage by the said defendant, as aforesaid, a railroad completed, and running from the said city
46 of Racine some forty miles towards said Beloit, and nearly nor half ready for the iron all the way to said Beloit; nor was the same all, or nearly all paid for; and the said company was then largely indebted, and to such an extent as to be wholly unable to pay its indebtedness, and was then insolvent; and its property, and effects, and moneys were not then sufficient, nor near sufficient to pay the indebtedness and liabilities of the said corporation. And the said corporation, prior to the time last aforesaid, and prior to the time of making the aforesaid representations as aforesaid, to secure *to secure* the payment of six hundred and eighty thousand dollars of its bonds, to that amount issued by said corporation, and then wholly unpaid; had mortgaged its entire line of railroad from the said city of Racine to said Beloit, together with all its depot, and station grounds, and all its buildings and superstructures of every kind and character, and all its side tracks and turn-outs, and all other its railroad fixtures
47 and appurtenances, and all its locomotives, engines, tenders, and cars, of every kind and description, and also the franchise of said corporation; and which mortgage was in full force and effect and a lien upon the property therein described, and thereby mortgaged; and the said mortgaged property was not at the time last aforesaid worth the amount of money for which the same was mortgaged as aforesaid; nor was the said corporation then, to wit, at the time last aforesaid, receiving, nor at any time prior thereto had said corporation been receiving large sums of money from the operations of its said completed railroad, and sufficient to pay ten per cent., nor

any per cent., per annum to its stockholders, nor was there then, to wit, at the time of the making the aforesaid representations as aforesaid subscribed to the capital stock of said corporation by responsible persons along the line of the railroad of the said corporation or elsewhere, the sum of six hundred thousand dollars, nor so much as three hundred thousand dollars, nor had the said corporation then, to wit, at the time last aforesaid, on hand sufficient friends to
48 complete said railroad to said Beloit, nor one-fourth the funds necessary for that purpose.

And the said defendant further in fact saith, that at the time last above mentioned the stock of said corporation had no market value, and never had had any market value, and then was wholly worthless, and from that time to the present continually hath been, and now is, of no value whatever, whereby and by means whereof the consideration for the said promissory note hath wholly failed.

And the said defendant further in fact saith, that said corporation hath never to this time constructed any railroad from said Freeport to said Savanna.

And the said defendant further in fact saith, that at and prior to the time when the said plaintiff became possessor of the said promissory note, he, the said plaintiff, was informed and knew that the said promissory note had been obtained from the said defendant by the aforesaid false and fraudulent statements and representations, and under the aforesaid agreement between the said defend-
49 ant and the said corporation; and that the said promissory note had been made and delivered to the said corporation in full and absolute payment of its capital stock as aforesaid, and that said stock never had been of any value, and that by means thereof the consideration for the said note had wholly failed.

And the said defendant further, in fact, saith, that the promissory note in this plea mentioned is the same promise and undertaking mentioned in the first and second counts of the declaration of the said plaintiff mentioned, and not other or different; and this the said defendant is ready to verify. Wherefore, the said defendant prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, the said defendant, by reason of anything contained in the said first and second counts of the said plaintiff's declaration, &c.

J. H. KNOWLTON,
Att'y for Def't.

United States of America, circuit court of the United States
50 for the northern district of Illinois, of term, 1865.

TUNIS COOPER
vs.
JACOB LABER. } Assumpsit.

And the said defendant, Jacob Laber, by his attorney, J. H. Knowlton, for a further plea in this behalf, (leave of the court for that purpose being first had and obtained,) says, that the said plain-

tiff ought not to have or maintain his aforesaid action thereof against him, the said defendant, by reason of anything contained in the first count of the declaration of the said plaintiff, because, he says, that the promissory note in the said first count mentioned hath never been at any time assigned or transferred by the Racine and Mississippi Railroad Company, in the said first count mentioned, by any endorsement of the said company upon or of the said promissory note, and this the said defendant is ready to certify. Wherefore he, the said defendant, prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against the said defendant by reason of anything contained in the first count of the declaration of the said plaintiff, &c.

J. H. KNOWLTON,
Att'y for Def't.

51 STATE OF WISCONSIN, *Rock county, ss:*

Jacob Laber, being first duly sworn, on oath, says that he is the defendant mentioned in the foregoing plea, and that has heard the said plea read, and knows the contents thereof, and that the said plea is true in substance and matter of fact as he is informed and verily believes, and further saith not.

+ JACOB LABER.

Subscribed and sworn to before me, this twenty-ninth day of June, A. D. 1865.

D. W. C. CASTLE,
Commissioner Circuit Court United States Dist. Wisconsin.

United States of America, circuit court of the United States for the northern district Illinois, of term, 1865.

TUNIS COOPER
vs. } Assumpsit.
JACOB LABER.

And the said defendant, for a further plea in this behalf, (leave of the court for that purpose being first had and obtained,) says that the said plaintiff ought not to have or maintain his aforesaid
52 action thereof against the said defendant by reason of anything contained in the second count of the declaration of the said plaintiff, because he says that the promissory note in the said second count mentioned hath never at any time been assigned or transferred by the Racine and Mississippi Railroad Company, in the said count mentioned, by any endorsement of the said company upon or of the said promissory note, and this the said defendant is ready to verify. Wherefore, the said defendant prays judgment if the said plaintiff ought to have or maintain his aforesaid action thereof against him, the said defendant, by reason of anything in the second count of the declaration of the said plaintiff contained, &c.

J. H. KNOWLTON.
Att'y for Def't.

STATE OF WISCONSIN, *Rock county*, *ss:*

Jacob Laber being first duly sworn, on oath, deposes and says, that he is the defendant mentioned in the foregoing plea, and that he has heard the said plea read and knows the contents thereof, and that the said plea is true in substance and matter of fact, as he is
53 informed and verily believes, and further saith not.

+ JACOB LABER.

Subscribed and sworn to before me, this 29th day of June, 1865.

D. W. C. CASTLE,
Commissioner Circuit Court United States
For the district of Wisconsin.

Endorsed: Filed July 1st, 1865.

WM. H. BRADLEY, *Cl'k.*

On this day, to wit, the 25th day of July, A. D. 1865, came said plaintiff, by his attorney, and filed in said clerk's office, his replication in said entitled cause, which said replication is in the words and figures following, to wit:

Replication.

UNITED STATES CIRCUIT COURT, *Northern district of Illinois, ss:*

July term, A. D. 1865.

TUNIS COOPER
vs.
JACOB LABER.

And the said plaintiff, as to the said amended plea of the said defendant, by him firstly above pleaded, says, that the said plaintiff, by reason of anything by the said defendant in that plea
54 alleged, ought not to be barred from having and maintaining his aforesaid action thereof against the said defendant, because he says that he, this plaintiff, did not have any knowledge or information, or notice whatever of the said facts averred in defendant's said plea as constituting the said defense of failure of consideration to the said note, neither before nor at the time of the endorsement and transfer of the said note to this plaintiff by the payee, and before maturity thereof; and this the said plaintiff prays may be inquired of by the country, etc.

LEWIS UMLAUF,
Pl't'ff's Att'y.

Endorsed: Filed July 25th, 1865.

WM. H. BRADLEY, *C'lk.*

On this day, to wit, the 16th day of October, in the adjourned October term, A. D. 1866, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

TUNIS COOPER
vs. } Assumpsit.
JACOB LABER.

Now come the parties, by their attorneys, and upon issue joined thereupon, come a jury of good and lawful men, to wit,
55 John M. Brown, Sylvester Remmington, s'r., Luther Busley, Nathaniel Smith, Samuel Penniman, Platt Townsend, D. H. Hammer, John McClure, William Griffin, Thomas J. Rudd, Theodore Glancy, and Samuel Fargo, who were all duly elected, tried, and sworn well and truly to try said issue, and after hearing a part of the evidence, the hour of adjournment having arrived the further trial of the cause is postponed until to-morrow morning.

On this day, to wit, the 17th day of October, in the adjourned October term, A. D. 1866, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

TUNIS COOPER
vs. } Assumpsit.
JACOB LABER.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empannelled and sworn, and after hearing the concluding evidence and a part of the arguments of counsel, the hour of adjournment having arrived the further trial of the cause is postponed until to-morrow morning.

56 On this day, to wit, the 18th day of October, in the adjourned October term, A. D. 1866, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

TUNIS COOPER
vs. } Assumpsit.
JACOB LABER.

Now come again the parties, by their attorneys, and now come also the jury in this behalf empannelled and sworn, and after hearing the concluding argument of counsel and receiving the instructions of the court, the jury retire to consider of their verdict, and by agreement of the parties, by their attorneys, the jury, when they shall have agreed upon their verdict, may sign and seal the same and deliver it to the clerk, and disperse.

On this day, to wit, the 19th day of October, in the adjourned October term, A. D. 1866, of said court in the record of the proceedings thereof in said entitled cause, is the following entry to wit:

TUNIS COOPER
vs.
JACOB LABER. } Assumpsit.

57 The jury in this behalf empannelled and sworn, this day returned into court their sealed verdict, wherein they say we, the jury, find the issue for the plaintiff and assess his damages to the sum of seven thousand one hundred and ninety-two dollars and thirty-five cents. And thereupon the defendant, by his attorney, moves the court for a new trial herein.

On this day, to wit: the 30th day of October, in the adjourned October term, A. D. 1866, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

TUNIS COOPER
vs.
JACOB LABER. } Assumpsit.

Now come the parties, by their attorneys, and now comes on to be heard the motion of the defendant, heretofore entered herein, for a new trial of this cause, and after hearing the argument of counsel the court takes the same under advisement.

58 On this day, to wit: the 26th day of November, in the adjourned November term, A. D. 1866, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

TUNIS COOPER
vs.
JACOB LABER. } Assumpsit.

The court having considered, and being now fully advised upon the motion of the defendant, heretofore entered herein, for a new trial of this cause, overrules the same and awards judgment upon the finding of the jury in this behalf. It is thereupon considered and adjudged by the court that the plaintiff have and recover of the defendant the said sum of seven thousand one hundred and ninety-two dollars and thirty-five cents, his damages so as aforesaid assessed by the jury, together with his costs by him about his suit in this behalf expended, amounting to the sum of one hundred and twenty dollars and twenty cents, and that he have execution therefor.

On the hearing of said cause the following exceptions were had and allowed:

59 UNITED STATES OF AMERICA, *State of Illinois:*
In the circuit court of the United States for the Northern district of Illinois.

TUNIS COOPER
vs.
JACOB LABER. } Bill of Exceptions.

Be it remembered that on the trial of this cause at the October term, A. D. 1866, of the said circuit court, the said plaintiff to main-

tain the issue on his part gave in evidence as follows: Henry S. Durand, a witness called on behalf of the plaintiff, being duly sworn was examined in chief by Mr. Umlauf, attorney for the plaintiff, and who testified as follows:

1 q. Look at this note, (showing the note sued on and the endorsement on it,) look at this endorsement; is this your hand writing?

A. It is.

2 q. Were you an officer of the Racine and Mississippi Railroad Company at the time of the endorsement of this paper of this note?

A. I was.

3 q. State to the jury what officer you were.

A. I was president of the company.

4 q. How long were you president of the Racine and Mississippi Railroad Company?

A. From 1852 to 1865.

q. Did you make this endorsement in your private or official capacity?

60 6 q. State to the jury the circumstances under which you made that endorsement of this note to the complainant.

A. I don't remember anything about that precise endorsement. I have no recollection about the time I endorsed it.

7 q. Do you remember, Mr. Durand, the circumstances attending the endorsement of this note, or notes of that character generally?

A. I do; these notes when they were first sold by the company there was a bond attached to them embracing assignment; it was supposed to be all that was necessary to give to the purchaser a legal title. It was afterwards found by the statue of Illinois that negotiable paper must have the endorsement of the payee upon the back.

When that fact came to the knowledge of the holders and to the knowledge of the company, they from time to time brought their papers to be endorsed, and it was under those circumstances that the endorsement was made; but most of these notes, perhaps some, were endorsed at the time they were sold, but many of these notes were endorsed afterwards to perfect the title.

8 q. You mean that this was done in pursuance of this statute after the actual transfer was made of the note by the company?

A. Yes, sir; parties bought these mortgages and paid for them, and it was for the purpose of giving them a legal title for what they paid for—to perfect the title.

9 q. You do not remember when this was signed?

A. I do not remember the particular time.

10 q. Well, were these assignments authorized by the com-

61 pany—how was that?

A. I was authorized to negotiate these securities.

Cross-examined by Mr. DeWolf:

Q. That was in writing?

A. Yes, sir.

Q. You say you have negotiated these securities for the Racine and Mississippi Railroad Company, and you considered this endorsement a part of your authority?

A. I did, sir. It was granted to me by the board of directors. I negotiated these securities on behalf of the company.

By the Court:

Q. Well, when it was found that there was this defect, I understand there was no additional authority by the board of directors?

A. I think there was no action upon the subject by the board of directors after this defect was discovered. It was assented to by the majority of the directors that no further action was necessary. I repeat that the authority for endorsing these notes was conferred upon me by the board of directors, as I have stated, as well as the power to sell them and negotiate them. The subject was talked of in the board of directors, and it was thought by the directors that no further power was necessary. I was authorized to sell, and needed no further authority to perfect them.

Q. Do you remember about the time when you made this endorsement to perfect this assignment of this paper?

A. I do not, sir.

62 By Mr. Umlauf:

Q. Do you know whether it was before or after the maturity of it.

A. I know that I have never endorsed any since they were matured; it was before the maturity; I have not endorsed any since that; I remember it was before the time of maturity.

Q. Was the fact of your endorsing these papers to perfect the title in the holders known to the directors at the time when you did perfect them.

(Objected to as immaterial.)

Q. Do you know what was done with the money; how the money was applied that was received upon this paper.

(Objected to as immaterial.)

Mr. Umlauf—I will rest for the present.

Cross-examined by Mr. De Wolf:

Mr. Umlauf introduced a note in evidence. This was a note of $3,700 with interest at ten per cent., payable five years from the 10th of May, 1856. Mr. Durand, you have stated that these notes were sold with a bond attached.

A. I believe all of them were.

Q. Will you explain to the jury how these notes were sold, that is, how they were transferred originally, how they were disposed of, what form.

2. The note with the mortgage attached to the bond of the company. Was this the bond which was attached to the mortgage, (referring to the bond attached to the mortgage in this case.) This is the bond, look at it, and see if this is the kind which was generally

63 attached.

Ans. This is the kind of bond it was, but whether that was ever united to it I do not know. I think it was.

(Hands a copy of a pamphlet published by the company.)

Farm mortgage bonds.

OFFICE OF THE RACINE AND MISSISSIPPI R. R. Co.,
Racine, Wis., April 1st, 1856.

This company have for sale $500,000 of farm mortgage bonds, guaranteed by the company. These mortgages are for various amounts, from $500 to $5,000 each. They run for five years from the tenth day of May, 1856, upon interest at ten per cent. per annum, payable by the bond of the company, semi-annually, at their office in New York city. They constitute a three-fold security:

1. The note of the mortgagor. Our farmers are now in a very independent condition. Nine out of ten of the notes would be good without any other security. Indeed, in a majority of the cases, the makers could pay the notes at once, from the proceeds of their personal property alone.

2. The mortgage. The mortgages are taken to secure the notes, and are mostly upon valuable and improved farms situate in Winnebago, Stephenson, and Carroll counties, in the State of Illinois. These counties are upon the northern line of Illinois, have been settled about twenty years, are very populous, and contain the best lands in the State. The lands mortgaged are all situate near the line of the road, and the mortgages have been given by the inhabitants from an enlightened self-interest to secure its construction. It was better for them, and for the company, to give these mortgages than it would have been to have had them made cash subscriptions. Better for them, because in this new country, where improvements are being made rapidly, each farmer can use his cash means more profitably otherwise. Better for the company, because thereby they get their whole cash means at once and they can complete the road immediately. The lands being near the line of the road, its construction will enhance their value in most cases more than the amount of the mortgage.

The mortgages are a first lien upon the premises, and the official certificate from the proper county officer accompanies each one, showing that the land is free from all other incumbrances whatever.

None of them are for more than two-thirds of the appraised value of the lands at their present worth. The appraisal is made by two persons appointed by the company, and their certificate of appraisal accompanies each mortgage. Great caution has been used in getting low appraisals, and there has been no inducement for the company to have any other as they had more mortgages offered than they wanted to take.

The lands in this part of the west all have a market price, which can be realized at any time upon short notice. They are continually increasing in value, owing to the rapid improvements made in the country, and the great immigation; and cash sales are frequent in every neighborhood.

By the laws of Illinois, the process of foreclosure is simple and speedy, and the lands are sold at auction to the highest bidder,

absolutely, allowing the mortgagor one year's redemption by paying the amount the land sold for with interest at ten per cent.

3. The bond of the company. This is made the principal debt, and the note and mortgage are placed as collateral. The company agree to pay the principal and interest at their office in New York city, the interest semi-annually. The bonds are made with coupons. The value of this bond must depend upon the value of the project of the road in itself, the amount and character of the capital stock which the company has in proportion to the cost of the road, the amount already done by the company, and the management of the affairs of the company.

The project of the road.

This is a legitimate railroad, and one which ought to be built. It has, from the first, had the unqualified endorsement of the best railroad men in the country. It runs east and west, according to the natural channels of business. It forms one of the shortest routes between Lake Michigan and the Mississippi river, and passes through a better tract of country, and a more populous, than any other running in that direction. Its way business alone will make the stock remunerative.

Cost of the road.

The distance from Racine to Savanna, on the Mississippi, is 136 miles; and, at $25,000 per mile, the cost of the road would be $3,400,000. This estimate is a high one, and will cover all discounts, the interest accruing during construction, and large equipments.

Capital stock.

There is now over $3,000,000 of subscribed capital stock. This is of three kinds.

1. Individual cash subscriptions to the amount of $425,000. There has been already paid upon these over $200,000, and nearly the whole subscription may be considered as secured thereby.

2. $540,000 of subscriptions by town and city bonds, $490,000 of which have been negotiated, netting the company 87¼ cents on the dollar.

$2,035,000 secured by farm mortgages, as above stated; of which $600,000 have been already negotiated at par.

No railroad company in the west ever had a subscription to compare with this, either in amount or availability.

In addition to this, the company has issued its first mortgage bonds on the road from Racine to Beloit, 68 miles, for $680,000, all of which have been lately negotiated on favorable terms.

What the company has done.

The road is completed and in operation 47 miles, from Racine to Delavan.

The iron, chairs, and spikes, for the whole road to the Mississippi, are purchased.

The right of way to Beloit is paid for, and the road between Delavan and Beloit is more than two-thirds graded.

The depot grounds at Racine and Beloit were purchased at about $60,000, and are worth now over $250,000. The depot grounds at the intermediate stations have been donated to the company.

All the depot buildings and station-houses at Racine, Delavan, and the towns between, are completed.

There has been 35 miles of road fenced and 28 ballasted.

The road will be completed 101 miles to Freeport this season, and to the Mississippi as soon after as men and money can do it.

The management of the road.

The stockholders and the directors all reside upon the line of the road. There are over 2,500 stockholders. The company has met with no losses. It has paid out none of its stock for work or materials, except a little for tracklaying, safes, and scales at par value. It has done its work thus far, and purchased its iron and other materials, at the lowest cash prices. The company stands well in New York city, and has received great credit there from the most respectable parties.

The forms of the note, mortgage, and bond are given in the appendix. The company invite the closest scrutiny as to the character of these securities. Considering the project of the road itself, the amount and character of the subscribed stock, the work already done, and the materials bought, the management of the road—all as affecting the company's bond, and adding to the farm mortgage and note—and the security is unquestionable.

HENRY S. DURAND,
President.

APPENDIX.

Form of note.

Know all men by these presents, that , of , county of , and State of Illinois, being justly indebted to the Racine and Mississippi Railroad Company in the sum of dollars, lawful money of the United States of America, for full value received, does, in consideration thereof, hereby promise to pay the said Racine and Mississippi Railroad Company, or order, the sum of dollars at at the expiration of five years from the tenth day of May, A. D. 1856, together with interest thereon at the rate of ten per cent. per annum, payable annually on the 10th day of May in each year after

the date hereof, principal and interest payable at the office of said company in the city of Racine, in the State of Wisconsin.

In witness whereof, I have hereunto set my hand, this day of , in the year of our Lord one thousand eight hundred and fifty.

Form of mortgage.

This indenture, made the day of , in the year of our Lord one thousand eight hundred and fifty , between , of the , in the county of , State of Illinois, part of the first part, and the Racine and Mississippi Railroad Company, party of the second part, witnesseth, that the said part of the first part, for and in consideration of the sum of dollars to in hand paid, the receipt whereof is hereby acknowledged, ha granted, bargained, and sold, and by these presents do grant, bargain, and sell unto the said party of the second part, and to their assigns forever, all that certain real estate situated in the said State of Illinois, and known and described as follows, to wit:

To have and to hold the above bargained premises, with the appurtenances, unto the said party of the second part, and their assigns forever; provided always, and these presents are upon this express condition, that if the said part of the first part, heirs, executors, administrators, or assigns, shall well and truly pay, or cause to be paid, to the party of the second part, or their assigns, the sum of dollars. in five years from the tenth day of May, in the year of our Lord one thousand eight hundred and fifty-six, and interest thereon from and after said tenth day of May, A. D. 1856, annually, at the rate of ten per centum per annum, at the office of said railroad company, in the city of Racine, in the State of Wisconsin, according to the tenor and effect of a certain promissory note, bearing even date herewith, executed by the said of the part of the first part to the said party of the second part, and shall pay all taxes and assessesments upon said premises, and every part thereof, at the time when the same shall become due, then these presents and the said note shall be null and void.

And the said part of the first part do further covenant and agree that will pay all taxes and assessments of every nature that may be assessed on said premises previous to the day appointed by any law of the State for the sale of lands for taxes. And in case of the non-payment of the said sum and interest mentioned in said note, or any part thereof, at the time or times above limited for the payment thereof, or in case of the non-payment of any taxes that may be assessed on said premises in manner aforesaid, then and in either case it shall or may be lawful for the said party of the second part or their assigns

And the said part of the first part do hereby further covenant and agree, and by these presents empower and authorize the said party of the second part, or their assigns, to grant, bargain, sell, re-

lease, and convey the said premises, with the appurtenances thereunto belonging, at public auction or vendue, and on such sale to make and execute to the purchaser or purchasers, his or their heirs and assigns forever, good, ample, and sufficient deeds of conveyance in the law pursuant to the statute in such cases made and provided, and out of the monies arising from such sale to retain the principal and interest which shall then be due on the said note, together with the costs and charges, and all taxes, assessments, and charges on said premises, which may be paid by the said part of the second part, or their assigns, rendering the surplus monies, if any there be, to the said part of the first part, heirs, executors, administrators, or assigns, after deducting the cost of such vendue as aforesaid.

And the said for and heirs, executors, and administrators, do covenant, grant, bargain, and agree to and with the said part of the second part and their assigns, that at the time of the ensealing and delivery of these presents well seized of the premises above conveyed, as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law in fee simple, and ha good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner and form as aforesaid, and that the same are free and clear from all incumbrances of whatever kind or nature soever; and against all and every person or persons lawfully claiming or to claim the whole or any part thereof, will forever warrant and defend.

In witness whereof, the said part of the first part ha hereunto set hand and seal the day and year first above written.

[L. S.]
[L. S.]

Signed, sealed, and delivered in presence of—

Form of acknowledgment.

STATE OF ILLINOIS, *County of*

I, , in and for the said county, do hereby certify that , personally known to me to be the person whose name subscribed to the forgegoing mortgage as having executed the same, appeared before me this day in person, and acknowledged that signed, sealed, and delivered the same as free and voluntary act and deed for the uses and purposes therein set forth.

And the said , personally known to me to be the wife of the said , and as the person who subscribed said mortgage as such, having been by me acquainted with the contents and meaning of said instrument of writing, and examined separate and apart from her husband, acknowledged that she had executed the same, and relinquished her dower and all rights whatever, whether of dower or otherwise, in and to the lands and tenements therein mentioned, voluntarily, freely, and without compulsion of her said husband, and that she does not wish to retract.

Given under my band and seal at this day of A. D. 1856.

Form of abstract of title to the lands described in the mortgage.

Patent from the United States to
Recorded vol. page
Deed from to
dated Recorded vol. page

Mortgage from to
Dated Recorded vol. page

OFFICE OF

185 .

STATE OF , *County, ss:*

This is to certify that we, the undersigned, at the request of the Racine and Mississippi Railroad Company, have examined the premises described in the foregoing mortgage, and find the same to be worth dollars, at a fair and reasonable valuation, exclusive of the value of all buildings, barns, and outhouses situated thereon.

Dated this day of 185 .

Form of bond.

No. $

UNITED STATES OF AMERICA, *State of*

RACINE AND MISSISSIPPI RAILROAD COMPANY.

Know all men by these presents: That the Racine and Mississippi Railroad Company is justly indebted, and promise to pay to or bearer dollars on the tenth day of May, 1861, at their office in the city of New York, together with interest thereon from and after the tenth day of May, at the rate of ten per cent. per annum, payable semi-annually on each tenth day of November and May, upon the presentation and surrender of the annexed coupons at the said office. To the payment whereof the said company hereby bind themselves firmly by these presents; and for the better security of such payments being made to the holder hereof, the said company have assigned and transferred, and by these presents does assign and transfer, to the said holder of this bond a certain note for the sum of dollars, executed by , together with a mortgage given collateral to, and for the purpose of securing the payment of the same, dated on the day of , 1856, payable in five years from the tenth day of May, 1856, with interest at the rate of ten per cent. per annum, which said note and mortgage are hereto appended, and are transferable in connection with this bond, and not otherwise, to any parties or purchasers whomsoever.

And the said company do hereby authorize and empower the holder of this bond, at any time, in case said company shall fail to perform any of the foregoing stipulations by neglecting to pay either principal or interest on this bond, when the same shall become due, to proceed and foreclose the said mortgage, or take such other legal remedy on said note and mortgage against said mortgagor, or against this company on this present bond, or on both, as shall seem proper and expedient to said holder hereof.

In testimony whereof, the said company have hereto caused to be affixed their corporate seal, and these presents to be subscribed by their president, and countersigned by their secretary.

By order of the board of directors, this 1856.

[L. S.] *Pres't.*

Sec'y.

Form of coupon.

$ No.

On the tenth day of May, 1861, the Racine and Mississippi Railroad Company will pay to the holder hereof, at their office in the city of New York, dollars, interest due that day on the bond, No.

Secretary.

Is it recited in the copy accompanying it? when these securities were sold were those pamphlets put into the hands of the agents, an exhibit of these securities in that form (referring to the pamphlet)? was these pamphlets used or did it accompany the securities at the time the sales were made?

A. I do not think it was so used, it was for general distribution.

Q. Did not the agents have these pamphlets for the purpose of making sales and explaining the character of these securities when they made sales?

A. I should think they had.

Q. Were they not made for the purpose of explaining the character of these securities?

A. They were.

Q. They were published for that purpose?

A. Yes, sir.

Q. They were generally supplied to the agents in making these sales?

A. Yes, sir, I should think they were.

Q. Was George Wilkinson supplied with these pamphlets?

A. He was.

Q. You say this was signed sometime after the giving of it, (the note,) but you cannot state when; let me ask you, was there any note assigned by endorsement on the back, in any case of the Illi-

64 nois notes; was there any assignment thus made until the spring of 1859, or about the time that judge Hovey had

papers of this kind assigned; was not that the first time the question was raised in relation to these assignments?

A. Well, I could not remember as to that.

Q. What is your best recollection of what season it was; was not it the spring of 1859? What is your best recollection upon that subject? I want merely to call your attention to the fact as to time, that is all.

A. My impression is that it was the fall of 1858. It was after the selling of those notes.

Q. Was the order authorizing you to sell entered upon the books of the company? Was it in writing? Were those orders and resolutions of which you have spoken upon the books of the company?

A. To the best of my recollection, they were. I could not say positively. I think they were.

The plaintiffs then offered the note sued on in this case.

(Copy of said note is marked Exhibit No. 1, attached to depositions of Wilkinson and T. Cooper, page 271 of this record.)

WM. H. BRADLEY, *Clerk.*

65 And the said defendant to maintain the said issue on his part, gave in evidence to the jury the following evidence, to wit:

Mr. De Wolf then offered in evidence the deposition of Emanuel S torer, Samuel I. Davis, and Merrill.

(Objected to on the ground of incompetency.)

Admitted, subject to objection.

66 Depositions of Emanuel Stover, F. W. Merrill, and Samuel J. Davis, witnesses produced, sworn and examined on the 8th and 9th days of May, A. D. 1866, before H. C. Hyde, a notary public for the town of Freeport, in the county of Stephenson, and State of Illinois, at his office in the City of Freeport, in said county, by the agreement of the parties, plaintiff and defendant, in a certain cause depending in the circuit court of the United States for the northern district of Illinois, wherein Tunis Cooper is plaintiff, and Jacob Laber is defendant.

On the part and behalf of said defendant.

Emanuel Stover, a witness produced, sworn and examined on the part of said defendant, deposeth and saith as follows, in answer to the several interrogatories hereinafter written:

67 Interrogatory 1st. What is your name, age, occupation, and residence?

Answer. My name is Emanuel Stover; am 38 years of age; am a mechanic, and reside at Lanark, Carroll county, Illinois.

Int. 2d. Do you know the parties, plaintiff and defendant, to this suit; and if yea, how long have you known them respectively?

Ans. I do not know Tunis Cooper, the plaintiff; have known the defendant, Jacob Laber, for one or two months last past.

Int. 3d. Were you ever an officer or agent, and which, of the Racine and Mississippi Railroad Company? if yea, what office did

you hold, and when were you elected or appointed, and how long were you such agent or officer?

Ans. I was elected a director in the said railroad company, I think in January, 1857, and re-elected again in 1858. I served two years in that capacity.

68 Int. 4th. During the time you were director of said company, were there any resolutions, or orders, or by-laws of the board of directors, conferring any, and what authority to H. S. Durand as president, or otherwise, and giving any authority to assign by endorsement the promissory notes given to the said company in payment of the capital stock, or any of them, or were there any such resolutions, orders, or by-laws offered in said board of directors, and if offered, what action was taken in said board, and what was done with such resolution, orders, or by-laws by said board.

(Objected to by plaintiff on the ground of incompetency and irrelevancy.)

Ans. There was not to my knowledge. There was a resolution offered at one time at a meeting of said board, in my presence, to authorize and empower Henry S. Durand to endorse or assign the notes and mortgages given in payment of the capital stock of

69 said company. The resolution was voted down by the board, a majority of one of the members of the board present being against it. This is the only resolution of the kind I know of.

(Answer objected to by plaintiff for some reason or question.)

Int. 5th. Was there any record or minute made upon the books of said railroad company of the resolution named by you in answer to the last above interrogatory, or how otherwise is or was the fact?

Ans. I think there was no record kept of the resolution. We were not in the habit of recording resolutions that were voted down.

Int. 6th. During the time that you were a director of said railroad company, were there any and what claim or claims presented to said board of directors, of the indebtedness of said company, arising prior to the 1st of March, A. D. 1856, or how otherwise is and was the fact?

70 Ans. There were claims presented of indebtedness arising prior to the year 1856, but I cannot state anything definitely as to amounts, or whose claims they were.

Int. 7th. From the knowledge you derived while acting in the board of directors, state whether the claims arising prior to the 1st of March, 1856, were large or small, or how otherwise; or state whether, from the information thus derived, how large that indebtedness was, and state the amount thereof, if you can, or as accurately as you can now state the same, and whether the same was a floating debt, or how much thereof; state all you know in relation to this subject.

Ans. I would say the claims against the company, arising prior to the 1st of March, 1856; were large. I would put the amount of said indebtedness at half a million of dollars. Part of this amount was a floating debt, but I could not state how much; I mean, that the half

a million of indebtedness of the company spoken of by me is
71 over and above the bonded debt of the company.

(The last above question and answer objected to by plaintiff, on ground of incompetency and irrelevancy.)

Cross-examination by plaintiff:

Cross-int. 1st. Where did you reside when you were first elected a director of the Racine and Mississippi Railroad Company?

Ans. At Cherry Grove, in Carroll county, Illinois.

Cross-int. 2d. Did you continue there to reside until your directorship expired in 1859?

Ans. I did.

Cross-int. 3d. How were you elected such director?

Ans. By a vote of the stockholders voting by proxy.

72 Cross-int. 4th. Was it by ballot, in writing, or viva voce?

Ans. By ballot in writing at the second election. I was not present at the first meeting when I was elected, and cannot say.

Cross-int. 5th. Was the fact of your election as such director entered in any of the books of the Racine and Mississippi Railroad Company at the time of, or soon after your election?

Ans. I could not say.

Cross-int. 6th. Have you ever examined the books of this company?

Ans. Not thoroughly. I have frequently looked into them.

Cross-int. 7th. Did you make examination of the books of the company for any specific purpose?

Ans. I did not, except the annual reports of the company.

73 Cross-int. 8th. Did you examine any of these books during the first year of your directorship?

Ans. I did not examine them for any specific purpose; have frequently looked into them.

Cross-int. 9th. How long time did you devote to the inspection of the company's books at any given time during the first year of your directorship?

Ans. Not over fifteen minutes, except the reports. I have looked at them longer than that.

Cross-int. 10th. Did you examine the reports during the first year of your directorship?

Ans. I did.

Cross-int. 11th. What reports did you then examine?

Ans. Those that were issued at the time I was a member, in the year 1857. I do not remember of examining the reports that
74 were made previous to that.

Cross-int. 12th. How many reports did you then examine, one, two, three, or more?

Ans. I only recollect of examining one at that time.

Cross-int. 13th. During what month in 1857 did you examine the report mentioned?

Ans. I think in each and every month.

Cross-int. 14th. At what time was that report first issued?

Ans. I think in January, 1857.

Cross-int. 15th. Did you inspect that report upon the request of any person or persons, or at your own option?

Ans. Only at my own option.

Cross-int. 16th. How long a time did you devote to the inspection of the report mentioned, in the year 1857?

75 Ans. I think about three or four hours a month during that time, put it all together.

Cross-int. 17th. Where were these books kept during the time you were director of this company?

Ans. The books were kept in the office of the company in the city of Racine. I mean the books of the company.

Cross-int. 18th. When and where was your election held?

Ans. In January of 1857 and 1858, at the company's office, in the city of Racine.

Cross-int. 19th. Was the report you examined, as before stated, an annual report of the company?

Ans. It was.

Cross-int. 20th. For what year was this report issued?

Ans. For the year preceding January, 1857.

Cross-int. 21st. Did you devote as much time to the examination in the company's books, issued by the company in January,

76 1858, for the year 1857, as you have stated to have devoted to the examination of the report issued January, 1857?

Ans. I did. I think more.

Cross-int. 22d. How many directors had been elected by the Racine and Mississippi Railroad Company during the years 1857 and 1858?

Ans. I think twelve each year.

Cross-int. 23d. Were there any holding over?

Ans. No, there were not, that I am aware of.

Cross-int. 24th. How many regular and how many special meetings were held by the directors of the Racine and Mississippi Railroad Company during the year 1857?

Ans. I think there were twelve regular meetings and one or two special meetings.

Cross-int. 25th. How many of them did you attend?

Ans. I attended ten, I think. I am not certain that I attended any special meetings.

77 Cross-int. 26th. Where were these meetings held?

Ans. They were all held at the company's office in the city of Racine.

Cross-int. 27th. How many such meetings were held by the board of directors of this company in 1858; where and how many did you attend?

Ans. I think there were twelve regular meetings, and likely one special meeting. They were all held at the city of Racine, except one held in Freeport, I think. I attended all the meetings but one held that year. I don't think I attended the special meeting.

Cross-int. 28th. What was your occupation in 1857 and 1858?

Ans. I lived on my farm during these years, but did not work it.

Cross-int. 29th. When did you become a stockholder in the
78 Racine and Mississippi Railroad Company?

Ans. I think in May, of the year 1856.

Cross-int. 30th. What was the amount of your stock subscription?

Ans. The amount of my stock subscription was ten thousand dollars.

Cross-int. 31st. In what manner did you pay for this amount of stock, and when?

Ans. I gave my own notes and mortgage on real estate for the whole amount in May, 1856, to the Racine and Mississippi Railroad Company.

Cross-int. 32d. Did you give these mortgages upon your farm in Carroll county, or upon other lands?

Ans. Upon my farm in Carroll county.

Cross-int. 33d. Have you since paid off those notes, or any of them, by you so given?

Ans. I have not.

79 Cross-int. 34th. Has payment thereon been demanded of you since their maturity?

Ans. Payment of them has been demanded.

Cross-int. 35th. Are they, or any of them, in suit against you, and where?

Ans. Some of them are, I believe, in Chicago, in the circuit court of the United States for the northern district of Illinois.

Cross-int. 36th. Are the counsel for the defendant in this cause also defending you in the suits upon your notes mentioned?

Ans. They are.

Cross-int. 37th. At what time and by whom was the resolution, mentioned in your answer to the fourth interrogatory, offered, and at what meeting of the board of directors of this railroad company?

Ans. It was offered in the latter part of the year 1858, I think, at a regular meeting of the board. I don't recollect by whom it
80 was offered.

Cross-int. 38th. How many directors were present at the meeting when this resolution was offered, and what are their names?

Ans. I think there were as many as nine or ten. I am not able to give their names.

Cross-int. 39th. Do you not recollect the names of any of the directors who were present at the meeting last mentioned?

Ans. I know that Henry S. Durand, Daniel P. Holt, and myself, were there. The meeting was held at the city of Racine.

Cross-int. 40th. Was the resolution offered reduced to writing at the time it was offered?

Ans. It was reduced to writing.

Cross-int. 41st. Where is it now?

Ans. I could not say.

Cross-int. 42d. What became of it?

Ans. I think it was torn up.

81 Cross-int. 43d. Was any minute in writing of this resolution, at the time or afterwards, made upon any of the books of the Racine and Mississippi Railroad Company?

Ans. Not that I saw or heard of; we were not in the habit of recording resolutions that were voted down.

Cross-int. 45th. Did you vote upon the resolution so offered?

Ans. I did vote upon it.

Cross-int. 46th. Did you vote in favor of conferring upon said Henry S. Durand, the president of the said railroad company, the power and authority to assign by endorsement the said notes, or did you vote against conferring such power and authority?

Ans. I voted against conferring such power and authority.

Cross-int. 47th. In answer to the last direct interrogatory, you stated that the Racine and Mississippi Railroad Company, prior to the first of March, 1856, were indebted to the amount of half
82 a million of dollars, I now desire you to state when this fact first came to your knowledge.

Ans. Not until the latter part of the year 1858.

Cross-int. 48th. Was it before or after the time when the resolution aforementioned was offered at the meeting of the directors as aforesaid?

Ans. It was about that time. Can't say whether it was before or after.

Cross-int. 49th. When, to your knowledge, was the first claim of indebtedness presented to the company?

Ans. During the early part of the term that I was a member of the board of directors.

Cross-int. 50th. What manner of claims were they when they were presented to the company while you were director? Specify particularly.

Ans. Claims for grading, for building and purchase of cars, and, I think, locomotives; I don't know that the board made any distinction between new claims or old ones.

83 Cross-int. 51st. What do you mean by saying that there was no distinction made between old and new claims? Do you mean to say that they were passed upon by the board of directors without knowing whether they were old or new claims? If not, what do you mean to say?

Ans. It was always known by the board whether the claims were old or new; but what I do mean is, that they were all considered indebtedness of the company, and we did not give one the preference of the other. We met them or put them off, as best we could.

Cross-int. 52d. Do you mean to say that at all times when any claims were presented to the board of directors, you, yourself, then knew upon what such claims were founded and when they had matured?

Ans. No, I do not.

Cross-int. 53d. What amount of claims, when and by whom, were presented to the board of directors, while you were a member
84 thereof, for grading the track of the Racine and Mississippi railroad, and what part of it?

Ans. I could not state, not being acquainted with any of the parties and don't recollect the names. Do not know as to what part of

the road the claims were for. I do not remember the amounts of the claims represented.

Cross-int. 54th. Can you not state the average, if not the particular amount?

Ans. I could not say.

Cross-int. 55th. Can you state an approximate amount?

Ans. The claims for grading were so mixed up with claims accruing at the time, that I cannot separate the one from the other.

Cross-int. 56th. When had these claims accrued for grading and constructing the road?

Ans. These claims were accruing all the time while I was a director, as well as from the commencement of the building of the road.

85 Cross-int. 57th. Can you specify any one or more claims for grading and constructing the road, which had accrued prior to the time of your election as director in 1857?

Ans. I could not.

Cross-int. 58th. Do you mean to swear that any such claims for grading and constructing the road were presented to the board of directors while you were one of them, which had matured prior to your election in 1857, and which remained unpaid?

Ans. I am satisfied there were such claims, but cannot state them particularly.

Cross-int. 59th. Whence did you derive your knowledge of the existence of such prior claims?

Ans. I recollect it partially from the claims being presented, and from the annual reports of 1857 and 1858.

Cross-int. 60th. Do you know what amount of these claims
86 were paid by the company while you were a director?

Ans. I do not remember.

Cross-int. 61st. Were any of them paid?

Ans. That is my recollection that there were some of them paid, but not all. I could not say whether the greater portion of them, which were presented while I was a director, were paid or not.

Cross-int. 62d. Do you remember any single indebtedness of the company for grading and constructing the road that had matured on or before the first of June, 1856, and that remained unpaid at the time of your election in 1857?

Ans. I do not recollect any one.

Cross-int. 63d. What amount of claims were presented to the board of directors, when you were one of them, against the company for the purchasing or contracting of locomotives or cars on any
87 rolling stock, and had any of such claims, to your knowledge, matured prior to the first of June, 1856, and remained still unpaid?

Ans. I could not say what amount of claims were so presented. I think some such claims had matured prior to the first of June, 1856, and remained unpaid; but cannot state as to the amount.

Cross-int. 64th. Do you mean positively to swear that there were such claims remaining unpaid?

Ans. Not that I saw or heard of; we were not in the habit of recording resolutions that were voted down.

Cross-int. 45th. Did you vote upon the resolution so offered?

Ans. I did vote upon it.

Cross-int. 46th. Did you vote in favor of conferring upon said Henry S. Durand, the president of the said railroad company, the power and authority to assign by endorsement the said notes, or did you vote against conferring such power and authority?

Ans. I voted against conferring such power and authority.

Cross-int. 47th. In answer to the last direct interrogatory, you stated that the Racine and Mississippi Railroad Company, prior to the first of March, 1856, were indebted to the amount of half
82 a million of dollars, I now desire you to state when this fact first came to your knowledge.

Ans. Not until the latter part of the year 1858.

Cross-int. 48th. Was it before or after the time when the resolution aforementioned was offered at the meeting of the directors as aforesaid?

Ans. It was about that time. Can't say whether it was before or after.

Cross-int. 49th. When, to your knowledge, was the first claim of indebtedness presented to the company?

Ans. During the early part of the term that I was a member of the board of directors.

Cross-int. 50th. What manner of claims were they when they were presented to the company while you were director? Specify particularly.

Ans. Claims for grading, for building and purchase of cars, and, I think, locomotives; I don't know that the board made any distinction between new claims or old ones.

83 Cross-int. 51st. What do you mean by saying that there was no distinction made between old and new claims? Do you mean to say that they were passed upon by the board of directors without knowing whether they were old or new claims? If not, what do you mean to say?

Ans. It was always known by the board whether the claims were old or new; but what I do mean is, that they were all considered indebtedness of the company, and we did not give one the preference of the other. We met them or put them off, as best we could.

Cross-int. 52d. Do you mean to say that at all times when any claims were presented to the board of directors, you, yourself, then knew upon what such claims were founded and when they had matured?

Ans. No, I do not.

Cross-int. 53d. What amount of claims, when and by whom, were presented to the board of directors, while you were a member
84 thereof, for grading the track of the Racine and Mississippi railroad, and what part of it?

Ans. I could not state, not being acquainted with any of the parties and don't recollect the names. Do not know as to what part of

the road the claims were for. I do not remember the amounts of the claims represented.

Cross-int. 54th. Can you not state the average, if not the particular amount?

Ans. I could not say.

Cross-int. 55th. Can you state an approximate amount?

Ans. The claims for grading were so mixed up with claims accruing at the time, that I cannot separate the one from the other.

Cross-int. 56th. When had these claims accrued for grading and constructing the road?

Ans. These claims were accruing all the time while I was a director, as well as from the commencement of the building of the road.

85 Cross-int. 57th. Can you specify any one or more claims for grading and constructing the road, which had accrued prior to the time of your election as director in 1857?

Ans. I could not.

Cross-int. 58th. Do you mean to swear that any such claims for grading and constructing the road were presented to the board of directors while you were one of them, which had matured prior to your election in 1857, and which remained unpaid?

Ans. I am satisfied there were such claims, but cannot state them particularly.

Cross-int. 59th. Whence did you derive your knowledge of the existence of such prior claims?

Ans. I recollect it partially from the claims being presented, and from the annual reports of 1857 and 1858.

Cross-int. 60th. Do you know what amount of these claims
86 were paid by the company while you were a director?

Ans. I do not remember.

Cross-int. 61st. Were any of them paid?

Ans. That is my recollection that there were some of them paid, but not all. I could not say whether the greater portion of them, which were presented while I was a director, were paid or not.

Cross-int. 62d. Do you remember any single indebtedness of the company for grading and constructing the road that had matured on or before the first of June, 1856, and that remained unpaid at the time of your election in 1857?

Ans. I do not recollect any one.

Cross-int. 63d. What amount of claims were presented to the board of directors, when you were one of them, against the company for the purchasing or contracting of locomotives or cars on any
87 rolling stock, and had any of such claims, to your knowledge, matured prior to the first of June, 1856, and remained still unpaid?

Ans. I could not say what amount of claims were so presented. I think some such claims had matured prior to the first of June, 1856, and remained unpaid; but cannot state as to the amount.

Cross-int. 64th. Do you mean positively to swear that there were such claims remaining unpaid?

Ans. I do.

Cross-int. 65th. Have you no idea of their aggregate amount prior to June 1, 1856?

Ans. I could not state what it was.

Cross-int. 66th. What do you mean by floating debt?

Ans. The indebtedness of the company not secured by notes and mortgage.

Cross-int. 67th. What particular or gross amount of floating debt had accrued against the Racine and Mississippi Railroad Com-
88 pany, prior to June 1st, 1856, and which remained unpaid in 1859?

Ans. I don't know the amount?

Cross-int. 67th. State how and in what manner the Racine & Mississippi Railroad Company contracted debts, which you call floating debts?

Ans. They would purchase cars and engines, and give their obligations. This would be one way. When the company made purchases and gave their obligations without giving bonds and mortgages. The indebtedness so created, I call floating indebtedness.

Cross-int. 68th. What was the practice of the board of directors of this company while you were one of the directors, when claims were by any party presented to them against the company? Were such claims in writing? Were they filed and preserved among the records of the company? Was any entry thereof made on the books of the company or any minute in writing preserved in any manner, when they were received when paid, or remained unpaid?

89 Ans. The practice was to refer them to a committee, and the committee would make such disposition of them as they best could. The claims were presented sometimes in writing, and sometimes the claimant would appear in person and present his claim verbally. I do not know whether they were filed among the records of the company or not—suppose they were so filed and kept. I did not keep the books, but I think the claims that were paid were either filed and kept, or some entry or minute of them on the books of the company. I don't think any records or minute was made of claims that were presented and not paid.

Cross-int. 69th. Are you now an officer of the Racine & Mississippi Railroad Company?

Ans. I am not.

Direct examination resumed:

Int. 1st. Do you know whether the stock of the Racine & Mississippi Railroad Company has had any, and what market value
90 from the 1st of March, 1856, up to the present date, or how otherwise was and is the fact?

(Obj. to by complainant because it is not relevant to the issues in the case.)

Ans. I do not know that the stock of the company has ever had any market value; so far as I know it has not.

Cross-examination resumed :

Cross-int. 1st. Have you ever known that, at any time, the stock of the Racine & Mississippi Railroad Company has ever been offered for sale in any general market?

Ans. I do not know that it has.

EMANUEL STOVER.

Subscribed and sworn to before me, this 8th day of May, 1866.

H. C. HYDE,

[SEAL.] *Notary Public.*

[5-cent revenue stamp.]

91 F. W. Merrill, a witness produced, sworn and examined on the part of said defendant, deposeth and saith as follows, in answer to the several interrogatories hereinafter written.

Interrogatory 1st. What is your name, age, occupation and residence?

Ans. My name is F. W. Merrill, am 45 years old, reside at Rocktown, Wennebago county, Illinois; am a merchant.

Int. 2d. Do you know the parties, plaintiff and defendant; and if yea, how long have you known them respectively?

Ans. Do not know plaintiff or defendant.

Int. 3d. Were you at any time a director or other officer, and what, of the Racine and Mississippi Railroad Company? If yea, when elected or appointed; and how long did you serve as such director or officer.

Ans. I was elected a director of the company in the first
92 board after the consolidation of the road. I think it was in 1854. (Obj'd by plaintiff to witness stating anything about the consolidation of the road.) I was director from that time, with the exception of one or two years, up to the year 1864. I think the year that I was out was 1858. Mr. Herring was elected director in my place for one or two years, which, I cannot state.

Int. 4th. During the time you were a director do you know whether the Racine and Mississippi Railroad Company had to suspend its operations in building the road for the want of funds, and when such suspension took place, how long it continued, and whether it was an entire suspension of all work, and what portion of the road was then in process of construction; state what you know in relation to the matter?

(Obj'd by plaintiff.)

Ans. The said company did suspend work on the road in the year 1854 or 1855. I think in 1854, while the road was being con-
93 structed from Delavan to Beloit, or from Burlington to Delavan, I am not certain which. It was an entire suspension of all work for want of funds and continued from six months to a year, can't state the time positively.

Int. 5th. Do you know and can you state what was the financial condition of the Racine and Mississippi Railroad Company, during

the latter part of the year 1855, up to first of June, 1856, as to its indebtedness and *and* what, and as to its floating debt, and if any? State all you know in relation to the condition of the road during that time?

(Obj. to by plaintiff.)

Ans. I know that the road was hard up at that time, and had a large floating debt. I do not know the amount. I know that during that time there was a continual demand for money that the company owed, and that the company was short for means.

(Obj. to by plaintiff.)

Int. 6th. During the period of time last mentioned do you
94 know whether the said company, for indebtedness which accrued in Wisconsin prior to June 1st, 1856, had to and did use any and what amount of notes and mortgages and other securities obtained in the State of Illinois, to pay said indebtedness, and what amount of such securities were so used, and under what circumstance and representations were said securities obtained and used for said purpose? state all you know in relation to this matter, and from whom and how such securities were obtained?

(Obj. to by plaintiff's counsel.)

Ans. The company had some of the first mortgages that were taken in Illinois, which they used to pay indebtedness of the company which had accrued in Wisconsin prior to June 1st, 1856. I don't know the amounts so used. These mortgages were taken by the agents of the company. I cannot state of my own knowledge under what circumstances the notes and mortgages so used were obtained, or what representations were made to obtain the same. I do not know from whence these securities were obtained. I know
95 that there were mortgages and notes taken in the State of Illinois and used in Wisconsin. The subscription to the stock of the company read that the notes and mortgages taken in Illinois should be used in building the road in Illinois, and the company, at this time, got hard up and used some of these notes and mortgages taken in Illinois to pay indebtedness that had accrued in Wisconsin. They called it borrowing and proposed to return the securities so used that the full amount of securities obtained in Illinois should be used in building the road in Illinois.

(Plaintiff by his counsel particularly objects to the testimony of witness which sets forth any of the terms or conditions in writing contained in the subscription lists by him mentioned.)

Int. 7th State whether at any time during the time you were director of said road, the company ever declared any dividend or dividends, or ever had any funds above running expenses from the operating of said road? if yea, what amount of dividends, and
96 what amount of funds was accumulated by said company from said source.

Ans. The company, during the time I was director, did not declare and dividends, and had no funds derived from the operating of its road over and above running expenses, to my knowledge.

Int. 8th. State, if you know, whether the capital stock of the

Racine and Mississippi Railroad Company, from the 1st of January, 1856, up to the present time, has had any market value at any time during said period; if yea, when and what was the market value?

Ans. I have never known of its having any market value.

Int. 9th. Was the company ever able to pay, and did it pay the current expenses of the directors while attending the meetings of the board of directors, while you were a director?

(Obj. to by plaintiff's counsel.)

97 Ans. At times they were paid by the company. I usually advanced my expenses, but I finally got it in stock and otherwise.

(Cross-examination by plaintiff:

Cross-int. 1st. Do you mean to say, in answer to the 4th direct interrogatory, that in 1854 or 1855, and during the time of suspension, as you term it, of all operation on the Racine and Mississippi railroad, no work or operation of any kind was in progress on said road.

Ans. I am not positive with regard to the year. I mean to state that there was no work of construction on the road during that time, to my knowledge.

Cross-int. 2d. Then you mean to say that no grading, laying of the track, excavating, or other work on the road was in progress during said time.

Ans. I do.

98 Cross-int. 3d. Would you have known it, if any operations on the road had been in progress?

Ans. I think I should.

Cross-int. 4th. Was any part of the road in running operation during this time?

Ans. It was; from Racine to Burlington, Wisconsin.

Cross-int. 5th. How long a period of time were these operations entirely suspended?

Ans. My impression is from six months to a year.

Cross-int. 6th. Could it have been less than six months?

Ans. I think not.

Cross-int. 7th. Was this suspension in 1854 or in 1855?

Ans. I could not state which year it was in.

Cross-int. 8th. But you are sure it took place either in 1854

99 or in 1855?

Ans. No. I am not positive as to the dates.

Cross-int. 9th. Then you would not be willing to state, but such suspension might have taken place in 1853 or 1856.

Ans. I think it must have taken place either in 1864, 1865, or after that date. I don't wish to state when it took place positively as I have no data to go by.

Cross-int. 10th. Do you mean to state that such suspension took place for want of funds to prosecute the work, and not for other causes?

Ans. I understood that it took place for want of funds to prosecute the work.

Cross-int. 11th. How did you come by that knowledge?

Ans. By conferring with the balance of the directors of the company and the president.

Cross-int. 12th. At their regular or special meetings or
100 outside?

Ans. It was so understood both at the meetings of the directors and outside.

Cross-int. 13th. Was this fact ever officially talked of in any of the regular or special meetings of the directors.

Ans. I think it was.

Cross-int. 14th. Did you ever take occasion during the time of said suspension to examine the books and vouchers of the treasurer of this company to ascertain what funds, bills, notes or other evidences of money were in the treasury during the time of this suspension?

Ans. I did not.

Cross-int. 15th. Then you do not know what funds in cash, notes, bills, or other evidences of money were during said time in the possession of the treasurer of this company and belonging to the company?

Ans. I do not.

101 Cross-int. 16th. Do you know when the note in this cause sued on was executed, what was paid for the same, to whom payment was made, and to what purpose the proceeds thereof were applied.

Ans. I do not.

Cross-int. 17th. Do you know anything about the note in controversy.

Ans. I do not.

Cross-int. 18th. Do you mean to say in your answer to the 7th direct interrogatory that no funds whatever had been derived from the operation of the road above running expenses were realized at any time while you were a director.

Ans. Not to my knowledge.

Cross-int. 19th. Could not funds have been realized and deposited in the treasury of the company, over and above necessary running expenses, and you not have known that fact?

102 Ans. Yes, there might.

Cross-int. 20th. In answer to the 8th direct interrogatory you do not mean to say but that the capital stock of this company did have a general marketable value prior to the year 1857.

Ans. I never knew that it had any.

Cross-int. 21st. Is it not true that such stock may have frequently been sold in general market or upon stock exchanges and you not know of it?

Ans. Yes; that might have happened.

Cross-int. 22d. Are you now, or have you ever been a dealer, broker, or trader in such kind of stock?

Ans. No; I never have been.

Cross-int. 23d. Are you a director now of the Racine and Mississippi Railroad Company.

Ans. I am not.

F. W. MERRILL.

103 Subscribed and sworn to before me, this 9th day of May, 1866.

[SEAL.] H. C. HYDE,
Notary Public.

[5-ct. revenue stamp.]

Samuel J. Davis, a witness produced, sworn, and examined on the part of said defendant, testified in answer to the several interrogatories hereinafter written, as follows:

Interrogatory 1st. What is your name, age, residence and occupation?

Ans. My name is Samuel J. Davis; am 43 years old; reside at Davis, in Stephenson county, Illinois; and am deputy United States assessor.

Int. 2d. Do you know the parties to this suit, plaintiff and
104 defendant; and if yea, how long have you known them respectively?

Ans. Have known the defendant since 1845; have seen two men by the name of Cooper, but don't know whether either of them were the plaintiff in this suit.

Int. 3d. Were you present at any time when Jacob Laber, the defendant, had any and what conversation with any agent or agents, and if any, what agent or agents of the Racine and Mississippi Railroad Company, for the taking of any capital stock in said railroad company? If yea, state whom said agents were; where and when such conversation took place, and what representations and statements were made by said agent or agents to said Laber as to the financial condition of said company, and as to the right or power to build any road or roads in the State of Illinois, and how it had acquired such power, and who was present at such conversation, and what amount of stock was sub-
105 scribed by said defendant, and how was said stock to be paid for, and how was it paid for. State all that occurred at such conversation.

(Obj. to by plaintiff as incompetent and irrelevant, and especially to the witness testifying to the representations and statements which may have been made.)

Ans. I was present at a conversation at defendant's house when defendant subscribed to the capital stock of said company. Chester Bush, who was the agent of the Racine and Mississippi Railroad Company, was there. Benjamin Dornblazer, a justice of the peace, was also there. The conversation was about defendant's taking stock in said railroad company. This conversation took place at defendant's house, in the town of Rock Grove, Stephenson county, Illinois. It was either in the month of May or June, 1856. Previous to the time of this conversation defendant had signed a subscription

list for stock in said road for $500, I think. At any rate the
106 amount he had so subscribed was considerable less than the amount he subsequently took. When we went to defendant's house he had concluded to take more stock. At this conversation Dornblazer did the talking to defendant, and made the same representations of the condition of the road as were made by Mr. Strong in his pamphlet. I don't know as anything was said at this time to defendant about the company's power to build the road; the conversation and representations were in regard to the benefit of building the road, and the profit of taking stock in it. The representations were that the subscription would be a safe investment; that the road would pay at least fifty per cent. of the amount subscribed within five years; that defendant, at the end of five years, sell his stock for enough to pay the balance of his subscription; that is, the fifty per cent. over and above what the road would pay him in dividends; that the company would guarantee to pay the interest on the note he should give for the amount subscribed. The representa-
107 tions made as to the financial condition of the road to defendant were, that the company had means enough to complete the road to Rockton, and would have a surplus of fifty thousand dollars left, and sufficient rolling stock to operate the road. Defendant, his wife, myself, Chester Bush, Benjamin Dornblazer, and, I think, two of defendant's boys, were present at this conversation.

The amount of defendant's subscription to the capital stock of the company was thirty-seven hundred dollars. Defendant paid for this stock by giving the said company his note, and securing the same by a mortgage on his farm. I think this was the substance of all that occurred at this conversation.

(Obj. by plaintiff for same reason as question.)

Int. 4th. Were you present at the sale of the note and mortgage of Jacob Laber to any person or persons; and, if so, to whom, and where and when sold, and who was present, and what was said respecting said note and mortgage, and by whom and
108 to whom?

Ans. I was. It was sold to a man by the name of Cooper, in July of 1856. I think it was at least in the summer of that year at the house of myself and brother, in the town of Rock River, Stephenson county, Illinois. The sale was made by Marshall M. Strong. Mr. Strong, Mr. Cooper, myself and brother John were present. We were called upon to witness the delivery of the note and mortgage, and the payment of the money which was a New York draft. At the time of the sale there was no conversation about the sale. The conversation about the sale was all had the day before. On the day previous to the sale, Marshall M. Strong and Mr. Cooper came to our house in a carriage. Mr. Strong gave me a bundle of mortgages. to select ten or fifteen thousand dollars of the best in the package, and wished me to go with him and Mr. Cooper that afternoon and show them the lands
109 on which the mortgages were given. I selected the mortgage of Jacob Laber, one of Charles T. Kleckem, one of James McElhiney, one of Thomas Shaw, and I think one or two others.

We then got into the carriage and went and looked at these lands. In the course of the ride all the railroad matters were discussed. The conversation was between Mr. Strong and Mr. Cooper. The substance of the conversation was that it was a good investment for farmers, that the notes and mortgages were amply secured, and that it was the most ready way of raising means to build the road.

Int. 5th. In the answer given to the last direct interrogatory, you state the whole subject of the adavntages of building the road was talked over between Mr. Strong and Mr. Cooper; in that conversation was anything said and what, by Mr. Strong, or any other person, to Mr. Cooper, as to any and what representations and inducements had been held out to the farmers to induce them to subscribe for so large an amount of stock in said railroad company, and to give their notes and
110 mortgages for the same. State all you know in relation to that subject.

Ans. I can't give the definite language that was used. The tenor of the conversation was that the road would be to the advantage of the country and its resources, that it would increase the value of lands and facilitating the transportion of produce. Mr. Strong compared the prospective value of the stock with that of the Galena railroad at that time.

Int. 6th. Was anything said by Mr. Strong, and what, during this conversation, respecting the representations to the farmers, as to *to* the company having guaranteed to the farmers the payments of the interest, and as to the means and resources and ability of the company to perform such an agreement, and state all that was said on that subject?

(Question and answer obj. to by plaintiff.)

Ans. There was something said to Mr. Cooper, that the interest of the bond would be paid by the company, at its office in
111 Racine. The substance of the statements made to Mr. Cooper were the same as those contained in the pamphlet published by Mr. Strong in relation to the road.

Int. 7th. Were you at the time of the taking of the stock of Mr. Laber, acting as an agent of the Racine and Mississippi Railroad Company, and in what manner were you appointed such agent, and by whom, or how otherwise is and was the fact?

Ans. At the preliminary meetings held by Mr. Strong, he asked me if I would assist in getting up the stock. Mr. Bush and R. W. Smith came to me with a letter of introduction from Mr. Strong, stating that they were authorized by the board of directors to take up the stock and requesting me to assist them. In this way I was acting as the agent of the company at the time the defendant subscribed. I had no other appointment or authority.

Int. 8th. Were there any public meetings held at Davis, by
112 any of the directors or agents, and by whom, in the spring of 1856, and were there any statements or representations made at such meetings as to the financial condition of said company, and as to whether the company was in debt, and state all that was said at said meetings or the substance thereof?

(Question and answer obj. to by plffs.)

Ans. There were no meetings held at Davis, because at that time there was no such place as Davis in existence.

Int. 9th. Were you present at any meeting of the directors of the company at Racine or elsewhere, and when and where, when any resolution or order authorizing H. E. Durand to make any assignment by endorsement of any and what notes was offered to be passed by said directors; and if yea, do you know what action was taken upon said resolution or order by said directors? State all you know upon that subject.

(Question and answer obj. to by plaintiff.)

Ans. I was in Racine at the time the directors were in session. It must have been in the spring of 1858; but I know nothing of
113 such a resolution being offered except from what others told me.

Int. 10th. Were you acquainted with the market value of the stock of the Racine and Mississippi Railroad Company from the first of January, 1856, up to the present time; if yea, what was and is the market value of said stock during said period?

Ans. I never knew that it had any market value. I never knew any being sold, except one transaction.

Cross-examination by plaintiff:

Cross-int. 1st. In answer to the third direct interrogatory, I desire you further to state about how long, to the best of your knowledge, you, Dornblayer and Bush, remained at defendant's house?

Ans. It was from 2 to 3 hours.

Cross-int. 2d. Was it in the forenoon or afternoon?

114 Ans. We went there about 10 o'clock a. m., and staid and got dinner.

Cross-int. 3d. Was the defendant in your presence all this time?

Ans. No, he was not. I remember of his being in and out of the house, and so was I.

Cross-int. 4th. Were you together in the same room during the time you were at defendant's house?

Ans. Yes; we were in the same room.

Cross-int. 5th. How large was the room?

Ans. It must have been about 12 feet by 20 feet.

Cross-int. 6th. Did you yourself have any conversation with the defendant during this time?

Ans. I did.

Cross-int. 7th. Was your conversation in English?

Ans. It was.

115 Cross-int. 8th. Was any of your conversation in reference to the railroad stock, subscription, and security matters?

Ans. I talked with the defendant about the amount subscribed by different parties in that neighborhood, and more especially about the division of his land between him and his brother. We talked about the division so as to get description correct in the mortgage.

Cross-int. 9th. Do you remember of then having conversed with defendant upon other topics, or were the subjects by you mentioned the only subjects of conversation?

Ans. I talked with him on other subjects; about building a new house, crops, and other matters, while Bush and Dornblayer were making out the papers.

Cross-int. 10th. Did you hear, during this time, any conversation between Bush and the defendant?

Ans. I did.

116 Cross-int. 11th. Was it in English?

Ans. The conversation with Mr. Bush was in English, with explanations by Mr. Dornblayer, in German.

Cross-int. 12th. Was Dornblayer requested by Bush to make explanations to defendant in German during the conversation between Bush and defendant?

Ans. Yes; I think he was.

Cross-int. 13th. Do you distinctly remember that he did?

Ans. Yes; I distinctly remember it.

Cross-int. 14th. What explanations did Bush request Dornblayer to make to defendant? Name them.

Ans. In relation to the plat of the land and in relation to the figuring. I don't remember any more distinctly.

Cross-int. 15th. Do you understand and speak German?

Ans. But very little.

117 Cross-int. 16th. Can you converse any in German?

Ans. So far as selling goods and in ordinary trade I can.

Cross-int. 17th. Do you understand any fluent conversation in German upon any other topics?

Ans. I never heard two Germans talking any length of time, but what I could understand what they were talking about, though I would not understand all that was said.

Cross-int. 18th. What proportion of words do you understand in any general fluent conversation in German upon other topics except the ones mentioned?

Ans. It is difficult for me to tell. In some conversations I would understand most that was said; in others, not much. If it was upon buing and selling cattle, raising crops, and the like, I should understand most of it; if upon religion or scientific subjects, not much.

118 Cross-int. 19th. Do you mean to say that upon most subjects of conversation in German, you understand the full sense of what is said?

Ans. I do as far as the ordinary business of the country is concerned.

Cross-int. 20th. Is it not true that before you went to see defendant at the time mentioned, defendant had already subscribed to the stock of this company, and that he was ready and willing to subscribe more, before anything was by either of you said to defendant in that behalf at that time?

Ans. He had subscribed $1,000, I think. He asked how much his neighbor, Ole Gardner, had taken, and how much Daniel Sheckler had taken, and how much Charles T. Cleckner had taken, and said that he could not take as much as Gardner or Sheckler. He was willing

to take his thousand dollars, but was not willing to take more, before we talked the matter over as I have stated. He did not say
119 that he would not take more than the $1,000 before we had this talk; but we had the talk before he said he would take as much as Gardner or Sheckler.

Cross-int. 21st. Is it not true that your only purpose and business at this time, in calling upon defendant, was to obtain his note and mortgage in payment of his stock by him before that time already subscribed?

Ans. No; I think it was not our only purpose, because we proposed to increase it if we could.

Cross-int. 22d. Did you not attend Bush and Dornblayer upon this visit for the mean purpose to conduct or carry them there in your or some other conveyance?

Ans. No; I did not.

Cross-int. 23d. Did you carry them there?

Ans. I owned the wagon, harness, and one horse of the team, and Dornblayer owned one horse. We all three drove part of the
120 time on the way.

Cross-int. 24th. Where did you start from.

Ans. We stated from the house of myself and mother in Rock Run.

Cross-int. 25th. How far from there did Dornblayer live?

Ans. Three and a half miles west.

Cross-int. 26th. How did Dornblayer come to your house? On foot, on horseback, or in carriage?

Ans. He came on horseback.

Cross-int. 27th. What was your other business at defendant's house at that time?

Ans. Had no other business. I went for the express purpose of taking the stock of Mr. Laber.

Cross-int. 28th. Who authorized you to take any stock for said company?

Ans. Marshall M. Strong, the attorney of the company, and also a director, authorized me to take or assist in taking the stock, both verbally and by letter.

121 Cross-int. 29th. Where is the letter?

Ans. I can't state.

Cross-int. 30th. What compensation were you to receive from Mr. Strong, or the said company, for the assistance of which you have spoken?

Ans. I never had any agreement with the company or Strong for compensation.

Cross-int. 31st. Did it require more than one agent of the company to obtain such stock?

Ans. It did require more than one, because it required a notary public, or justice of the peace, to take the acknowledgments of the parties, and two appraisers to appraise the land.

Cross-int. 32d. Were you at that time either a notary public, a justice of the peace, or an appraiser of the company?

122 Ans. I was an appraiser of the company.

Cross-int. 33d. Did you appraise the land mortgage by defendant to secure the note in controversy?

Ans. I assisted in appraising it.

Cross-int. 34th. Was your appraisement made in writing?

Ans. No; at least I don't think it was.

Cross-int. 35th. Was it not the business of the appraiser or appraisers to certify or cause to appear upon the mortgage, or attach some certificate in writing to the mortgage of the value of the land upon which such mortgage was given.

Ans. Yes, it was. In the appraisement of defendant's land, the certificate of appraisement was not made until several days after; and I can't say whether I signed it or not, but think not.

S. J. DAVIS.

Subscribed and sworn to before me, this 9th day of May, 1866.
[SEAL.] H. C. HYDE, *N. P.*

[5-cent rev. stamp.]

123 Mr. De Wolf then offered in evidence deposition of Benjamin Dornblaser, taken before Mr. Galt.

(Objected to on the ground of incompetency. Admitted, subject to objection.)

124 Circuit court of the United States for the northern district of Illinois.

TUNIS COOPER
vs. } Assumpsit.
JACOB LABER.

It is hereby stipulated that the testimony of J. K. Davis, Benjamin Dornblaser, and Emanuel Stover, and other witnesses, which shall be present, may be taken on the part of the defendants, to be used on the trial of this cause.

The service of any formal notice, and the issuing of a commission, is hereby waived upon the part of both plaintiff and defendant, and it is hereby agreed that A. T. Galt, esq., may take down the testimony upon the questions and cross-questions put to the witnesses, and that such testimony so taken shall have the same force
125 and effect as if taken by a commissioner, under a rule or notice regularly served, and commission issued in said cause out of said circuit court, subject only to such objections in matter of substance as if taken under a notice and commission.

March 21, 1866.

KNOWLTON & DEW OLF,
Att'ys for Def't.
LEWIS UMLAUF,
Att'y for Pl'tff.

UNITED STATES OF AMERICA, *Northern district of Illinois:*

Be it remembered, that on the 21st day of March, A. D. 1866, I, Azariah T. Galt, a notary public duly commissioned and qualified for the city of Chicago, in said district, and authorized by an act of Congress to take and certify oaths and affirmations in certain *certain* cases, did cause Benjamin Dornblaser personally to appear before me, at the office of L. Umlauf, esq., in the city, in said district, to testify on the part of the defendant, in a certain cause depending in the circuit court of the United States for the northern district of Illinois, at Chicago, wherein Tunis Cooper is plaintiff and Jacob Laber is defendant.

126 And the said Benjamin Dornbloser was by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid. I carefully examined the said Benjamin Dornblaser, and he did thereupon depose and say as follows:

1st int. What is your name, age, occupation, and place of residence?

Ans. My name is Benjamin Dornbloser; am of lawful age; my occupation has been serving my country in the army till recently. I live in Freeport, Illinois.

2d. int. Do you know the parties, plaintiff and defendant, in this cause; how long have you known them respectively?

Ans. I know defendant; I do not know the plaintiff. I have known the defendant about ten years.

3d int. Do you know who were the directors of the Racine and Mississippi Railroad Company, or any of the directors, during the years 1856; if yea, state the names of said directors.

127 Ans. I know who some of them were in the spring of 1856; Henry S. Durand, Marshall M. Strong, Judge William C. Allen, Mr. Fisher, of Beloit, John Rhinemalt, of Mt. Carroll, William Merrill. of Rocton, Mr. Holt, of Savanna. I think Dr. Martin and Holden Putnam, of Freeport, Ill., were also directors at the same time.

4th int. Do you know anything, and what, as to the taking of any subscriptions to the capital stock of the Racine and Mississippi Railroad Company during the year 1856, or at any other period, and when, in the county of Stephenson, Ill., or elsewhere, by any officer or agents of said company; if yea, what officers and agents; what was the mode, if you know; what inducements, if any, were held out by said agents, and what representations made, if any, and whether any representations were made by such agents at any time to Jacob Laber, the defendant, to induce him to subscribe for any capital stock in said company; and if any such representations were

128 made, when and where, and by whom made; state the same fully and particularly.

(Question objected to by counsel for pl'ff.)

Ans. In the spring of 1856 meetings were held in Stephenson county, Ill., by officers and agents of the Racine and Mississippi

railroad with a view to obtain subscriptions to the capital stock of the Racine and Mississippi Railroad Company, on condition that the payments should be made by farm mortgages. In taking those subscriptions, Marshall M. Strong and Thomas J. Turner were the principal agents, the inducements were based upon the annual report of said company, and a review published by Marshal M. Strong, one of the directors of said road. I do not know whether these men made any representations to the defendant, Jacob Laber. I do not know whether the defendant signed the subscription paper or not.

(Answer objected to by pl'ff's counsel.)

5th int. Do you know what agent or agents took the sub-
129 scription of stock of Jacob Laber, or either at any time and when the subscription which he originally made to the capital stock of said railroad company was increased by said Jacob Laber, and what agent or agents of said company took said additional subscription, and what representations were made, if any, in obtaining said additional subscription, and if made, by whom, and what were those representations, and do you know whether any pamphlets were published by Marshall M. Strong or any other person, or read, or contents stated to Jacob Laber, the defendant, and when and where were those representations made, if any, and if you state that any such representations were made or any such pamphlets were used, look upon the pamphlet here presented to you and state whether or not this was the pamphlet used in obtaining such additional mortgage; if yea, mark the same and annex it to your deposition.

(Question objected to by pl'ff's counsel.)

130 Ans. As I said in my previous answer, I do not know whether he signed the subscription roll or not, and therefore I do not know whether any agents applied to him to subscribe for capital stock.

(Answer objected to by pl'ff's counsel.)

6th int. Do you know whether any agent or agents of the Racine & Mississippi Railroad Company obtained any subscriptions to the capital stock of the Racine & Mississippi Railroad Company from Jacob Laber, the defendant, either by a subscription on a paper or otherwise, and how; whether any representations were made to induce said Laber to make any subscription to the stock of said company, what those representations were, if any, and how the subscriptions were to be paid; whether made on paper or otherwise, and whether at any time during said negotiation to obtain said notes and mortgage, and said subscription, if any; whether any pamphlet made by Marshall M. Strong was used to induce said Laber to make said subscription, and how otherwise is the fact; look upon the pamphlet here presented and state whether the same or a like pamphlet
131 was used on that occasion, and what use was made of it in obtaining such subscription and mortgage, or how otherwise is the fact; and who were present at the time; state all that was done.

(Question objected to by pl'ff counsel for incompetency and irrelevancy.)

Ans. In April or May, 1856, I, in company with C. C. Bush, of Racine, and Samuel J. Davis, of Rock Run, went to the house of the defendant to secure his note and mortgage for certain shares of capital stock in said company. The arguments used to induce him to take said stock were wholly based upon the previous annual report of said company and a review published by Marshall M. Strong, a director of said company. The statements and arguments made in those papers or document were of course set forth in the most favorable light. I do not remember if such pamphlet referred to in the interrogatory was then in the possession of either of us, but the contents thereof were known to us and made use of for the pur-
132 pose of securing as large amounts of subscription or mortgages possible to obtain. This pamphlet, marked Exhibit "A," is the pamphlet of which we stated the contents to the defendant at the time; the terms of the mortgage given by defendant were, that the mortgage should be paid in five years from the tenth day of May, 1856, with interest at the rate of ten per cent. per annum. The capital stock taken by the defendant was to be paid in note and mortgage.

(Answer objected to by pl'ff's counsel.)

7th int. Did you or any other person, and whom, at any and what time, in behalf or as agent of said railroad company, take any note or notes, mortgage or mortgages of the defendant in payment of subscription to the capital stock of said company, and if yea, what amount and number of notes and mortgages were executed by said defendant to said company, and of each, if any?

Ans. Mr. Bush, Mr. Davis and myself did obtain a note and
133 mortgage from the defendant in the month of April or May, 1856. I do not now remember the amount, or if there was more than one note or mortgage. I think there was but one. To the best of my recollection it was three thousand dollars. I cannot state the amount, certainly.

8th int. Did you at any other time than the one you have named, obtain for said company any other note and mortgage from the defendant?

Ans. I think I did not.

9th int. Did you at the time you obtained the subscription of this note and mortgage, make any, and what, statements or representations as to the pecuniary condition of said railroad company, or as to the amount of railroad it then had constructed, or as to the earnings of said railroad company, or as to whether said company was or was not indebted, or as to whether they had any surplus funds on hand, to induce him to subscribe stock in said company; and if so,
134 what were those representations, and who directed or requested you to so make such statements or representations?

(Question objected to by pl'ff's counsel as incompetent and irrelevant to the issues in the case.)

Ans. I do not think any statements were made not contained in the report and review before alluded to.

(Answer objected to.)

10th int. Look upon the pamphlet shown you, and say whether that is the annual report alluded to by you?

Ans. This is the report and I annex it to my deposition and mark it Exhibit B.

11th. int. State whether you were at any time, and when, a director in the Racine and Mississippi Railroad Company, and whether if such director, you have any and what knowledge as to whether the railroad company was in the financial condition and had built its road in the manner represented in said annual report of 1856, and
135 in said review, and whether it was as is therein represented, and how otherwise is and was the fact? State how you came by such knowledge, and all you know in relation thereto as to the truth and falsity of said report and review.

(Question objected to by pl'ff's counsel.)

Ans. I was a director of said railroad from January, 1858, to January, 1860.

It was not in the condition mentioned in the report and the review.

In the first place the materials said to be on hand in different localities to complete the road was not on hand as stated. Many of the assets of the company represented as being available, proved not to be so; bonds said to have been sold on favorable terms, were not sold but simply hypothecated.

The real estate encumbered and rolling stock not paid for; those are the principle items. The iron said to be at New Orleans for the building of said road, was not, and had not been there.

The iron that arrived at Racine, the duty on it had not been paid, and I think the iron itself was not paid for.

136 (Answer objected to by pl'ff's counsel.)

12th int. Has the stock of the Racine and Mississippi, or do you know whether the stock of that company on the first of January, 1856, or at any time between that period and the present, has had any and what market value in any general market; if yea, when and where, and what was the market value of said stock at or during said period of time?

(Question objected to by pl'ff's counsel.)

Ans. I remember of seeing but one quotation of the sale of said stock in the New York market since the organization of the company. I do not remember when it was or its value in market. I know of none having been sold further than the above in any general market.

I do not think it had at any time a definite market value in any general market.

(Answer objected to by pl'ff's counsel.)

13th int. Was there anything said, at the time of the subscription and mortgage referred to by you in answer to the interroga-
137 tory, as to when the avails of this and other like mortgages, or was any agreement or understanding had, and what, between the said Laber and the said agents of said railroad company, as to where the proceeds of the notes and mortgages taken between

Freeport and Beloit should be used or applied in the building of said road.

(Question objected to by pl'ff's counsel as incompetent.)

Ans. There was no agreement between the defendant and the agents of the said company to that effect, but statements were made to him that the notes and mortgages obtained, or the proceeds of the same west of Beloit, should be used in the construction of the road from that point west, that there was no necessity for appropriating any portion of them east of that point in the construction or equipment of said road.

(Answer objected to by pl'ff's counsel.)

14th int. State whether you have any knowledge, as to the
138 truth or falsity of that statement made in your last answer, acquired subsequent to that time by you as director, and as to the financial condition of said company at the time said statements were made, and previous, and as to the necessity of making use of any such mortgages for any indebtedness arising previous to making such statements, upon any portion of said road east of Beloit. What was the financial condition of said company for building said road east of Beloit, and was there any indebtedness exhisting, and how much? If you know, state all you know in relation to the condition of the company, previous to the time stated, as to its ability to build the road east of Beloit.

(Question objected to by pl'ff's counsel.)

Ans. The proceeds of the mortgages were thrown into the general fund and expended in the construction of the road, and liquidating floating debts of the company, regardless of said statement as to where the money should be applied. I cannot state the
139 amount of the indebtedness of the road.

(Answer objected to by pl'ff's counsel.)

Cross-examination by pl'ff counsel:

1st x-int. Where did you reside in 1855 and 1856?

Ans. In Rock Run, Stephenson county, Ill.

2d x-int. What was your occupation during those years.

Ans. County surveyor and justice of the peace.

3d x-int. When did you become a stockholder to the Racine and Mississippi Railroad Company?

Ans. In May, 1856.

4th x-int. In your answer to the 4th interrogatory you state, that meetings were held in the spring of 1856, in Stephenson county, by officers and agents of the Racine and Mississippi Railroad Company, to obtain subscriptions to the capital stock of said company, state more particularly when and where those meetings were held, who called and conducted them.

140 Ans. Meetings were held at Freeport, Ill., at Carnifex schoolhouse, in Rock Grove, and, I believe, at Egert's schoolhouse, in the town of Rock Run, Stephenson county, Ill. It was, as near as I remember, in months of January and February. The meetings were called and conducted by Henry S. Durand, Marshall M.

Strong, and Thomas J. Turner, and may have been others. I think Judge Allen may have been at some of them.

5th x-int. What other officers or agent of that company, except those you have just mentioned, did you see at any other meetings you mentioned?

Ans. I do not remember of seeing any others than those named.

6th x-int. How many of those meetings did you attend?

Ans. I attended but one of those named.

7th x-int. When and where did you attend other meetings of a similar kind?

141 Ans. I did not attend any other general meetings of the kind. I had frequent interviews with officers of the road at the time.

8th x-int. When and where was that meeting held which you attended?

Ans. At Carnifex school-house, in the town of Rock Run, Stephenson county, Ill., in January or February, 1856.

9th x-int. What principle officers or agents of said company were present at that meeting?

Ans. Marshall M. Strong and Thomas J. Turner; I believe Durand was there, but could not state positively.

10th x-int. By whom was that meeting called?

Ans. I cannot say by whom, definitely; it was called at the instigation of the leading officers of the road.

11th x-int. How do you know that?

142 Ans. I knew it by general report at the time.

(Examination adjourned at 5½ p. m., 21st, to 8½ a. m., March 22, 1866.)

12th x-int. Which of those officers addressed the meeting you attended?

Ans. Marshall M. Strong. He was the leading speaker. Col. Turner made some remarks.

13th x-int. What was the substance of their remarks so made at that meeting?

Ans. It was in substance that the Racine and Mississippi Railroad desired to build their road from Beloit, by way of Freeport, to Savanna, and that the definite route was not yet determined upon; that if the people on the line north of the Pecatonica should subscribe liberally to the capital stock of said road, that that route would be taken in preference to the one south of the Pecatonica, for the reason that said route would be more nearly an air line between the points named, arguing as an inducement to subscribe to

143 said stock, that parallel roads, less favorably situated, were and had been declaring large dividends; that this road was being built through a rich farming country, which would constitute a large local carrying trade; that the line would be equally well located for through trade and travel, and the statements made in the report of 1856, were reiterated. He had not then published his review.

14th x-int. Did those officers at the time have with them, and

make any use of, the annual report and the pamphlets issued by Marshall M. Strong, to which you referred?

Ans. They had the report, except the supplement dated April 1st, 1856, with them. The pamphlet was not then published.

15th x-int. Did you see Jacob Laber at that meeting?

Ans. I did not.

144 16th x-int. In your answer to the sixth interrogatory direct, you stated that you, in company with one C. C. Bush and Samuel J. Davis, in April or May, 1856, went together to the house of defendant to secure his note and mortgage for certain shares of capital stock in said railroad company; state now whether you did that upon your own accord, or whether you had been employed for that purpose by the said railroad company.

Ans. I was employed by the railroad company, through its agent, C. C. Bush; collectively we went to get these notes and mortgages. I went individually to take the acknowledgements of the parties and to interpret as I could speak the German.

17th x-int. When were you employed by said C. C. Bush to so act with him in behalf of the said railroad company?

Ans. Early in April, 1856.

18th x-int. Was your appointment made in writing or

145 verbally?

Ans. Verbally.

19th x-int. Were you to obtain for your services in that behalf rendered, any commission upon the amount of stock so solicited from the defendant?

Ans. No, sir.

20th x-int. If you were to receive any compensation for your services, state in what manner the said Bush agreed with you to pay you.

Ans. He agreed to give me per diem allowance and pay travelling expenses.

21st x-int. Did you more than once go, in company with the two persons mentioned, to the house of defendant to solicit his subscription to the capital stock of said company, and to take his note and mortgage in payment thereof?

Ans. Not that I can remember.

146 22d x-int. Who else was present at the house of defendant, when you, in company with the two persons mentioned, went to his house to solicit the said subscription and obtain said papers in payment thereof?

Ans. I remember none, but his own family.

23d x-int. How long did you remain at the house or upon the premises of defendant at the time mentioned in company with the said Bush and Davis?

Ans. I think we took dinner there; remained probably two hours.

24th x-int. State what you said and did during the said time, at the said place, to and with the defendant.

Ans. I stated to him in German the arguments made use of. I simply interpreted to him what the arguments were in German, and

based upon the annual report and review before alluded to. I took the acknowledgment of his mortgage, that was all so far as that was concerned. I saw him execute the note and mortgage.

147 24½ x-int. Did the said Bush and Davis, or either of them, dictate to you at said time what you said in German to defendant?

Ans. I do not think they did for the reason that I fully understood what was expected of me to do in casese, where parties could not speak or understand the English language fully from instructions received at the time of my appointment by said Bush.

25th x-int. Did ycu at the time mentioned speak any English to the defendant.

Ans. I do not think I did.

26th int. Did said Bush or Davis, or either of them, speak to defendant at the time mentioned in English?

Ans. Both did.

27th x-int. Had they, the said Bush and Davis, much conversation with defendant at the time mentioned?

Ans. They had a good deal of general conversation, but upon this particular subject they had but little.

148 28th int. Did said Bush and Davis understand German sufficient for general conversation?

Ans. They did not.

29th x-int. Was any delivery of the note and mortgage made and acknowledged by defendant at said time made to you, or any of you, as agents for the said R. R. company?

Ans. The note and mortgage was delivered to Mr. Bush at the time.

30th x-int. Was any certificate or other written evidence of capital stock in the said R. R. company delivered by you, or either of you, as such agents, to defendant in payment of said note and mortgage?

Ans. There was a written and printed certificate and stipulation of the company's given to him at the time. There was.

31st x-int. Is it not true that you were employed by said Bush for the purpose only of interpreting and of acknowledging papers

149 for him in behalf of said company?

Ans. That was the principal object for which I was employed.

32d x-int. Where is this Mr. Bush at present?

Ans. He is dead. I cannot state definitely when he died, but think it was in the year 1859.

33d x-int. In the answer to the 11th direct interrogatory, you state that you had been one of the directors of the said R. R. company; state now when you first became a stockholder in the said company to the amount of stock by you held, and what payments were made for the same?

Ans. I became a stockholder in said company in May, 1856, to the amount of 7,500 dollars; have paid the same, and have taken up my mortgage.

34th x-int. Where did you reside from January, 1858, to January 1860?

150 Ans. I lived in two towns, in Rock Run and Dacota, in Stephenson county, Illinois.

35th x-int. During the time you were a stockholder or director in said R. R. company, did you fill any other office or agency therein, other than before stated?

Ans. None, but a temporary one to secure a right of way.

36th x-int. Did you, as such director, attend the general and special meetings of the board of directors of the said R. R. company?

Ans. I attended all the general meetings and nearly all the special meetings during that time. About one meeting per month during the time.

37th x-int. You stated in your said answer that the materials in the report mentioned annexed to your said deposition said to be furnished or on hand in different localities to complete the road or track of the said R. R. company, were not so on hand or furnished as stated in the said report. Look at the report, and state de-

151 finitely to what materials therein mentioned you referred in the said answer.

Ans. In the first place I will point out the 2d paragraph of the supplement of the report of 1856, that the iron having been purchased and to be shipped early that spring was not so purchased and shipped as stated. A large portion of the locomotives and other materials specified was not so purchased and delivered. And the last paragraph of said supplement, so far as it relates to the iron being at New Orleans for the construction of said road, was wholly unfounded. By other materials, I mean to say the fourteen locomotives, five passenger cars, 1,600 car wheels, 800 car axles, 200 sets of car springs, 200 tons of bar iron, for car and repair shops, together with all of the small articles required for the completion of the whole work.

38th x-int. Do you mean to say in that the 7,000 tons of iron with the spikes and chairs in the supplement and in your answer mentioned had not been purchased by the said R. R. company?

152 Ans. They were not purchased as stated in the supplement.

39th x-int. Were they ever purchased, or any part of them by the said company or its officers?

Ans. No part of the iron referred to in this supplement ever was purchased.

40th x-int. Was there in contract or arrangement for the purchase of the said iron, or any part thereof, at any time made by the said R. R. company or through any of its officers?

Ans. Not to my knowledge.

41st x-int. How do you know that no purchase, agreement, or arrangement for the purchase of the said iron, or any part thereof, was ever made or entered into by the said R. R. company or any of its officers?

Ans. From the statements made by the president, Henry L. Durant, William C. Allin, and Mr. Fisher, members of the board of directors, in the general and special meetings of said board.

153 42d x-int. What statements did they or either of them make to you in reference to this iron?

Ans. That a certain lot of iron could be obtained at a certain rate but that the same would have to be paid for before possession could be obtained; this statement was made after Jan., 1858, and prior to Jan., 1860. They were made by Henry S. Durant, certain, in the presence of the board. The board was session at Racine, in Wisconsin.

43d x-int. Where was this iron in April 1st, 1856, and at the time Henry S. Durant made the said statement as you testified?

Ans. I do not know. As explanatory to the previous answer, I wish to say that the iron referred to in said answer was at the time these statements were made at one of the New England ports. Think it was Portland, Maine.

44th x-int. Do you know whether any railroad iron had been purchased or purchased and received by the said railroad company or any of its officers, on and prior to the first of April, 1856?

154 Ans. There was iron purchased and delivered to lay the track that had already been laid from Racine to Delavan.

45th x-int. Then all the knowledge you have in reference to the 7,000 tons of iron in supplement mentioned, you derived from the statements made by said Henry S. Durand, as you have testified; is that the case?

Ans. Yes; and from the examination of books and contracts in the company's office after I became a director.

46th x-int. Did you ever examine any of the books of the said corporation with particular reference to this 7,000 tons of iron in the supplement to the report mentioned?

Ans. Not specially as relating to this certain lot of iron, but to ascertain if any contracts for the purchase of iron to complete the road from Beloit to Freeport were made and entered on the books.

47th x-int. Is it not probable that such iron might have
155 been purchased or bargained for by an officer of the said company, and that fact not appearing on any of the books which you examined?

Ans. I think it is not probable.

48th x-int. Was every contract or arrangement for the purchase of iron or other materials entered upon the books of the company?

Ans. Yes; or embodied in the reports of its officers immediately after the transaction, and submitted to the board.

49th x-int. Have you carefully examined all the books of the railroad company where such transactions might be entered?

Ans. I have.

50th x-int. Do you mean positively to swear that the purchase or arrangement for purchase of the 7,000 tons of iron, or any part thereof, mentioned in said supplement, made prior to the 1st day of April, 1856, are not noted down or cannot be found in any of the books of the said railroad company?

Ans. I do.

156 51st x-int. Do you mean to say that the fourteen locomotives,

in the said supplement mentioned, were not purchased or bargained for by the said railroad company prior to the date of supplement, or that none of them were then on the road to be received or had not actually been received?

Ans. To the best of my knowledge and information, the locomotives purchased and on the way did not exceed five at that time. I know of no more than that number being bargained for and received.

52d x-int. Do you mean to say that the five passenger cars had not then been purchased or were not in course of construction for the said railroad company?

Ans. I cannot answer that question positively.

53d x-int. Do you mean to say that the sixteen hundred car wheels, or a less number, had not been purchased, bargained for, or received by the said railroad company?

Ans. No such contract appears on the books of the company. I have no other evidence of such contract being made for the
157 1,600 car wheels mentioned.

54 x-int. Do you mean to say that the 800 car axles in supplement mentioned had not been purchased, bargained for, or received by the said railroad company prior to the first of April, 1856?

Ans. My answer is the same as the one to the last question.

55th x-int. Do you make the same answer to the 200 sets of car springs, 200 tons of bar iron, mentioned in supplement prior to said time in reference to a purchase or a bargain for or receipt by the said railroad company?

Ans. I do.

56 x-int. Which of the assets of the said company mentioned in your answer to the 11th direct interrogatory were not and could not be made available, as stated by you?

Ans. Bonds and mortgages on real estate, stated to be $160,000; bonds of the town of Beloit, $43,000; subscriptions subject to call, $583,000; first mortgage 8-per cent. bonds on 68 miles of the road from Racine to Beloit, $680,000, stated as a part of the resources of the road on page 15 of Exhibit B, were not and could not
158 be made available to the amounts named in the report. The bonds and mortgages on real estate referred to were taken on lands in the State of Wisconsin. The "subscription subject to calls" were made in the State of Wisconsin, and were to be paid when called for. Many of these assets had already passed out of the hands of the company, and given as collateral security at a less sum than stated in the report.

57th x-int. With which and how many of the assets in your previous answer mentioned had the said railroad company parted prior to the date of the said report?

Ans. In regard to the bonds and mortgages, they were all sold or hypothecated prior to that report, except about $20,000, of which the title to the land mortgaged was imperfect. To the best of my knowledge the 8-per cent. first mortgage bonds were pledged to the parties who afterwards purchased them.

58th x-int. To whom were these bonds and mortgages on real

estate in Wisconsin, mentioned in your last answer, transferred by the railroad company?

159 Ans. To various parties, in payment of work and material. I can mention the name of but one party—Dutcher & Co.

59 x-int. What amount was transferred to Dutcher & Co., and for what?

Ans. I cannot state the amount or the contract for grading the road?

60 x-int. Did the railroad owe Dutcher & Co. on that contract?

Ans. Yes, sir.

61st x-int. Do you know, from your own knowledge, whether such bonds and mortgages, transferred to said Dutcher & Co., were transferred at par; that is to say, for the actual value in those papers expressed, or at a discount?

Ans. I do not know of my own knowledge whether they were or not. My knowledge of the transaction was derived from statements made, at various meetings of the board of directors, by Henry S. Durant, president of the same, to the effect that such mortgages and bonds had been placed in the hands of Dutcher & Co. for

160 negotiation, the proceeds of which were to be applied in liquidation of his claim; that some of the better class of mortgages held by Dutcher & Co., were negotiated at about par, or from ninety cents to par, and others as low as sixty cents on the dollar; and others were returned as not negotiable by reason of defect in title to the lands mortgaged.

63 x-int. Were the transfers of the bond and mortgages to Dutcher & Co. made before or after the date of the report mentioned?

Ans. I cannot say positively.

63d x-int. Don't you recollect what was the amount of those bonds and mortgages transferred to Dutchess & Co?

Ans. I do not.

64th x-int. Upon what terms were the other bonds and mortgages negotiated or transferred, not transferred to Ducher & Co. in the report mentioned, and at what time?

Ans. I do not know.

65 x-int. What do you know in reference to the sale of

161 the bonds of the town of Beloit in the report mentioned?

Ans. I know, from statements made by the president of the road, Mr. Durand, that said bonds were not negotiable at par.

66 x-int. When were they negotiated, and upon what terms?

Ans. I do not know when they were negotiated. The firm of Fisher, Keep, Talcott & Co. received some of them in payment of work done as contractors on said road, at less than their par value, but the precise figure I could not state. I cannot say whether they received all of them or not.

67th x-int. About how many did they receive, and about at what discount from par, and when?

Ans. I do not know.

68th x-int. Have you no recollection about those facts?

Ans. My recollection extends only to the fact that they did receive

a large amount of those bonds, and at such terms as would
162 enable them to negotiate the same without the probability of loss.

69th x-int. Do you know whether any of those bonds were at any time negotiated at par? I mean the bonds of the town of Beloit?

Ans. I do not.

70th x-int. Then you do not wish to say that some of those bonds were not negotiated at par?

Ans. No, sir.

71st x-int. Nor can you say upon what terms the said railroad company sold some of those bonds to said firm of Fisher, Keep, Talcott & Co.?

Ans. No, sir.

72d int. I believe you stated in your former answer that the subscriptions subject to calls, mentioned under the head of resources of the report in question, did not realize to said railroad company the amount there given? State, if you know, wherein the defects existed, or how they occurred.

163 Ans. By forfeiture of stock in non-payment of installments when called for.

73 x-int. About what was the actual difference between the sums on those subscriptions realized and the amount as given in the said report?

Ans. I do not know.

74 x-int. Have you no knowledge of that fact?

Ans. I have knowledge of such forfeitures being reported from time to time whilst I was a director; as to the amount forfeited prior to that time I have no personal knowledge; I do not know the amount forfeited while I was a director.

75 x-int. What do you know of sale and transfer of the first mortgage 8 per cent. bonds?

Ans. They were transferred in the spring of 1856, to the City of Glasgow Bank's agent, at eighty cents on the dollar; can't state the month.

76 x-int. What encumbered real estate and rolling stock, mentioned in your answer to the 11th direct interrogatory, were not paid
164 for at the date of that report?

Ans. The depot grounds at Beloit had been contracted for, but not paid; claims for payment for the same were presented to the board for payment, after I became a director of the road. I do not recollect the amount claimed. A small portion had been paid, not to exceed five hundred dollars.

77 x-int. What rolling stock do you refer to as not having been paid for at the date of that report?

Ans. As to the rolling stock, I cannot state definitely, and I wish to correct that part of my direct examination.

78 x-int. How do you know that the iron mentioned in supplement as being at New Orleans ready for shipment to Savana, was in fact never at New Orleans?

Ans. By the personal acknowledgment of *of* Henry S. Durand, the

president, while I was director, that the iron was not and had not been there.

165 79 x-int. In your answer to the 13th interrogatory you have stated, in substance, that the proceeds derived from the note and mortgage by defendant given to the railroad company, were to be used in the construction of the road from Beloit westward, and that such statements had been made to defendant. State by whom, when, and where those statements were made to defendant.

Ans. It was made by myself at the residence of the defendant, in the county of Stephenson, Ill., in April or May, 1856. This was at the time of the taking and acknowledgment of the mortgage. I spoke to him in German.

Re-examination by L. De Wolf, esq., for def't:

1st int. What statements were made, if any, by Mr. Durand or by Mr. Strong, or any other officer or agent of this road, as to the manner in which, or as to the power by which they expected to build a road in the State of Illinois from the State line to Freeport, and what was said in relation to the right to build a road, or how they acquired it?

(Question objected to, by counsel for pl'ff, as being incompetent, irrelevant, and immaterial to the issues.)

166 Ans. Statements were made that a consolidation between the Racine and Mississippi railroad and the Freeport, Rocton, and State-line road had been effected, and that the road from Beloit to Freeport, under the authority granted in the charter of the said Freeport, Rocton, and State-line railroad.

(Answer objected to.)

2d int. At the meeting at the Carnifex school-house, of which you spoke yesterday, what was said by Mr. Strong or other officer of said company, if anything, as to the parties attending that meeting, reiterating the statements there made to other parties to induce them to take stock in said company, and was there or was there not authority given to the parties attending, to state that the facts in relation to the financial condition of the road were true, and to induce their neighbors by such statements to take stock in said road by repeating said statements, and by requesting their neighbors to take such stock, or how otherwise is and was the fact in relation to such statements?

167 (Question objected to, by counsel for pl'ff, as not pertinent to the issue, and incompetent and irrevelant.)

Ans. Marshall M. Strong and Thomas J. Turner requested those present to talk up the project with their neighbors with the view to induce them to subscribe to the capital stock of said company, and to make the same statements to their neighbors as had been made by them, was, of course, implied. Marshall M. Strong is now dead. I forget the year. It was since 1861.

(Answer objected to by pl'ff's counsel.)

3d int. State, if you please, what you called a certificate in your

cross-examination yesterday, how it was executed—whether by the Racine and Mississippi Railroad Company and by the defendant, Laher, or whether the same was executed by Mr. Bush and Mr. Laher, or how otherwise is the fact?

Ans. I do not distinctly recollect, but think it was executed by Mr. Bush for and in behalf of the Racine and Mississippi
168 Railroad Company. I do not remember whether it was signed by the defendant or not.

B. DORNBLASER.

UNITED STATES OF AMERICA, *Northern district of Illinois, ss:*

I, Azariah T. Galt, a notary public, duly commissioned and qualified for the city of Chicago, in said district, do hereby certify that the above deposition was taken in pursuance of the annexed notice. I further certify that on the 21st and 22d days of March, A. D. 1866, I was attended by L. DeWolf, esq., counsel for defendant, and by L. Umlauf, esq., counsel for plaintiff, and by the said witness, who is of sound mind and of lawful age, and the said witness was by me first carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid, and the deposition was by me reduced to writing in the presence of the said witness and from his statement, and after carefully
169 reading the same to the said witness, he subscribed the same in my presence. I have retained the said deposition in my possession for the purpose of delivering the same with my own hand open in the court, for which the same was taken. And I do further certify that I am not of counsel nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in the said caption, and that the exhibits "A" and "B," hereto annexed, are the same referred to in the said deposition.

In testimony whereof I have hereunto set my hand and notarial seal this 22d day of March, 1866.

[SEAL.] AZARIAH T. GALT,
Notary Public.

[5-ct. revenue stamp.]

Exhibit A.

RACINE AND MISSISSIPPI RAILROAD PROJECT.

There has been so much and so varied an experience in the construction and use of railroads, that a prudent person can now form a pretty correct opinion beforehand whether any proposed road will be profitable or not. Especially is this the case where other roads have been built under almost exactly the same circumstances with the one proposed.

Many railroads in England costing $150,000 per mile, and many in the New England and Middle States from $40,000 to $80,000 per mile, have paid good dividends. But roads in the valley of the Mis-

sissippi have exceeded all others in profitableness, for the following reasons:

1st. They are usually built and equipped for about $25,000 per mile. The running expenses upon good roads at the East are about fifty per cent. of the gross receipts. Hence, to make a road one hundred miles long pay ten per cent. upon its stock, its annual receipts would have to be a million of dollars, if it cost $50,000 per mile; and only half a million if it cost but $25,000 per mile. A road at the West might make a good stock with the same amount of business, which upon an Eastern road of the same length might not pay running expenses.

2d. While the running expenses are about fifty per cent. upon Eastern roads, they are less than forty upon the same class of Western roads, owing to lower grades and higher prices for doing business. It would add two per cent. to the stock of a road one hundred miles long, costing $25,000 per mile, with annual earnings of $500,000, to have the running expenses forty per cent. instead of fifty.

3d. The prices for doing business are much higher on Western than on Eastern roads, and they are not likely to be soon reduced.

But the railroads running in a westerly direction from Lake Michigan, have paid better, far better, than any other, even in the West. There are five of these, although two of them are owned by the Chicago and Galena Company, viz: The Milwaukee and Mississippi, running one hundred miles west from Milwaukee to Madison—the Chicago and Galena main line, from Chicago to Freeport, one hundred and twenty-one miles, and Air Line to Fulton, one hundred and thirty-four miles—the Rock Island, one hundred and eighty miles, and the Chicago and Burlington, one hundred and ninety miles. Each of these roads was eminently successful before it reached fifty miles into the country. The M. & M. earned in 1855, $650,000, and divided 17 per cent.; the C. & G. earned $2,200,000, and divided 30 per cent.; the C. & B. made the same dividends, and the Rock Island very large, I do not know how much.

There are four prominent reasons for the enormous profitableness of these roads, viz:

1st. They run precisely in the direction, and by the shortest routes, in which not only passengers, but both heavy and light freights want to go. Lake Michigan is the end of navigation coming West. The heavy products of the country will always be transported by the lakes instead of by railroad. A bushel of wheat is carried from Racine to Buffalo, 1,000 miles, for eight cents at a good profit, while more than that is charged for carrying it 100 miles by rail. These roads, then, run right for heavy freights; and as they are on the shortest and most direct routes for the Eastern cities, they run right also for light freights and passengers. This is not the case with roads running southerly from Chicago or Lake Erie. These latter roads will carry the heavy freights to the lakes, but passengers and more valuable freights will seek shorter routes to the East. On

the other hand, the roads running east and west in Ohio, Indiana and Illinois, are not running in the right direction to carry off the heavy products of the country.

2d. These roads have an immense lumber business, which is peculiar to them. The roads in Ohio and Indiana do not have this business. The prairie country is not really reached until you come as far west as Illinois. This gives these roads freight from the lake to the interior almost equal in amount to the freights from the interior to the lake. The teamster can take a load to market for half price when he can get a load in return, and through the lumber business these roads have the same advantage. The lumber business over this vast prairie country of unequaled fertility, but destitute of timber, not only for building purposes, but to a great extent for fencing, will be enough of itself to support several railroads.

3d. These roads come in competition with no water communications. The roads running south from Chicago, compete with the Illinois canal; those south from Toledo, with the Wabash canal; south from Cleaveland, with the Ohio canal; east from Chicago, with the Lakes—the N. Y. Central and the N. Y. and Erie canal—many of the roads in the Atlantic States with the ocean, and many elsewhere with rivers. Indeed there is no other locality so entirely free from water communication as the country west of Lake Michigan. This is an immense advantage which might not at once be appreciated. When the citizens of New York State, some two years since, were about voting upon the enlargment of the Erie canal, it was officially stated that that canal carried to tide water during the preceding year, twenty times as many tons of freight as both the N. Y. Central and N. Y. and Erie railroads. The Lakes doubtless carry to Buffalo an hundred times as many tons as all the railroads from the West. Our railroads have to do the whole of that bulky business which is done elsewhere by canals, rivers, and lakes.

4th. No other section in the United States has such a vast region beyond it depending upon it for railroad facilities as the country between Lake Michigan and the Mississippi. The country west of Lake Michigan, and east of the base of the Rocky mountains, is greater in extent, and three times as fertile as all the country between Lake Michigan and the Atlantic. Nearly the whole surplus product of this vast country must pass over our roads on their way to market. Our roads, extending to the Mississippi, say 150 miles, will be but short links in roads extending indefinitely west. It is 300 miles across Iowa alone. Lake Michigan is not in the West, it is in the East; its western shore is, as it were, a seacoast for all the country west of it. Our roads are upon the last end of the routes upon which there will be the accumulation of all the business of the roads west of them. The roads east of us would have an advantage over us in this respect, were it not that they lose all the heavy freights which pass by the lakes and canal. This country, west of the Mississippi, gives to our roads a magnificent future, and that too at no distant day. Already the business it furnishes is very great—already settlements have been made as far as the western limits of Iowa.

These four causes are not only all permanent in their nature, but they must operate in a greatly increased ratio every year.

We will now scan closely the particular project in question; and for more exactness, we will consider it first from Racine to Beloit, then to Freeport, and then to the Mississippi.

Very many intelligent railroad men in the west, say that the way-business of a strip of country, west of Lake Michigan, twelve miles wide, running east and west, would support a railroad of sufficient length leading to the lake, and I am myself inclined to the same opinion.

The cost of the road from Racine to Beloit, 68 miles, at $25,000 per mile, will be $1,700,000.

To make this a ten per cent. stock, calling the running expenses 40 per cent., the annual receipts must be $283,000.

Racine is the only harbor on Lake Michigan between Milwaukee and Chicago, a distance of 86 miles. There is a strip of country dependent upon this road for at least eighteen miles wide the whole length of the road. Deduct the first 14 miles, as its business will be done principally by teams, and you have a road 54 miles long and 18 wide, equivalent to 27 townships of six miles square each. Each township contains 23,040 acres. Say that 10,000 acres in a township only are cultivated, that the average yield of all kinds of grain is but 25 bushels to the acre; that but one-half the amount raised is sent to market, and you have 3,375,000 bushels to be transported from the 27 townships, which at sixpence per bushel would amount to $210,000. Calling the return freights at only two-thirds of this amount, and the receipts are $350,000, much more than enough to make a 10 per cent. stock. If the amount of grain to be sent to market is estimated too high add all the live stock, and the meats which would be raised from the grain consumed at home, and the 13,000 acres not estimated as cultivated in each township; the products of the dairy; the wool, the fruits, the vegetables, and all the other products of such a country.

The through business upon the road will be very large. At Racine, the road will connect with the Collingwood Line of Steamers, the railroad through Michigan via Grand Haven and the Chicago and Milwaukee railroad. The first furnishes a cheap and pleasant route to New York during the season of navigation; the second a railroad route to New York about fifty miles nearer than to pass around Lake Michigan via Chicago; and the third gives a railroad connection with Milwaukee and all of the northeastern part of the State.

At Beloit it will connect with the Beloit and Madison road running forty-seven miles northwest. The importance of connecting roads which operate as feeders, is very great. The whole of the surplus products of the country depending upon the B. and M. road must go through to the lake. Thus, while that company would carry them upon an average, half the length of their road, 23 miles, we should carry them 68 miles, and earn three times as much freight for their business, as they would themselves. The same would be true of return freight. If the Beloit and Madison road had a margin of

country only 12 miles wide, and our road did its whole business, it would furnish a tract of country to our road nearly equal to sixteen townships, which owing to their greater distance would pay as much as the 27 townships immediately dependent upon our road. Besides, it gives us the through travel to Madison and the region of country connected with it.

Eight miles east of Beloit, our road crosses the Chicago, St. Paul, and Fond du Lac railroad leading from Chicago to Janesville, 90 miles. This places Racine 76 miles from Janesville, while Milwaukee is 72. At Beloit we meet the Chicago and Galena road running to Chicago, 98 miles, giving us thirty miles the advantage in distance.

Here let us consider the nature of the competition with the Chicago roads. It is admitted that for three or four months in the winter season, there will be no route to New York except via Chicago; while it is contended that during the remainder of the year, there will be as good, if not better routes offered via Racine. Wheat and pork have been uniformly higher in price, and lumber lower at the Wisconsin ports than at Chicago. So marked has this difference been, that for the past two years, wheat has been about eight cents per bushel higher, and lumber about two dollars per thousand lower at Janesville, which had the Milwaukee market, than at Beloit, which had the Chicago market. This difference, together with the advantage in distance, we believe will secure to the Racine road the majority of the heavy freighting from Beloit, and the Beloit and Madison road, and other places where we come in competition with the Chicago and Gelena road.

The Racine road is now open and running forty-six miles to Delavan. Since it has been opened twenty-six miles, during the past three months, it has averaged upon it nearly one hundred paying passengers per day. If the through and way passengers, after the road reaches Beloit, averaged a number equal to two hundred through passengers a day, their fares would amount to $120,000 per annum.

Add to our estimate for the way freight, all the business from Janesville from the Beloit and Madison road, all the through business, and all the passenger traffic, and say that the gross receipts upon the road will be but $283,000, and still you have a ten per cent. stock. Admit it to be only that for the sake of the argument.

We come next to Freeport. Here we are 34 miles from Beloit, 102 miles from Racine, 121 miles from Chicago by the Chicago and Galena road, 118 by our road and the Chicago, St. Paul, and Fond du Lac; but for the present we will lay aside the consideration of the Chicago business which will be done over our road. We should have an exclusive margin of way country between Beloit and Freeport at least twelve miles wide, still more fertile than that east of it, and upon an average twice as far from market.

At Freeport we form two highly important railroad connections, viz: with the Illinois Central going west, and with the same road going south. The Chicago and Galena road stops at Freeport, and

does not extend to Galena as its name would indicate. By the Illinois Central going west, we touch the Mississippi in the centre of the lead bearing region, at Galena and Dubuque, the two most important towns on the upper Mississippi, the latter destined to be a point for railroads to take their departure from through Iowa. The route from Dunleith, opposite Dubuque, to Chicago, is the most northern route from the Mississippi to Chicago. Hence it commands the business of the Upper Mississippi, including Minnesota, western Wisconsin, and northern Iowa; and will continue to do so except that our road will compete for it at Savanna, and the Galena Air-line at Fulton. The Racine road having 19 miles the advantage in distance over the Galena road at Freeport, and for other reasons I have given above, must compete successfully for a great portion of this business.

The Illinois Central passes through the whole of Illinois to Cairo. I will notice only one branch of business from this connection. At Lasalle, 80 miles south of Freeport, on the line of the Illinois Central road, coal is found in abundance, and is now brought in great quantities to Freeport. Racine itself, the whole line of country between Racine and Freeport, and other large portions of Wisconsin, will be supplied with fuel principally by this coal brought over the Racine road; and the cars returning will take lumber as far south as Lasalle. Coal is already taken 160 miles by rail into Chicago, and competes successfully with the Pennsylvania coal.

The railroad business of Freeport alone for the year 1855, amounted in freights and fares to over $250,000.

It is fair to suppose that the Racine and Chicago, St. Paul and Fond du Lac roads in connection would divide with the Galena road the business for Chicago at Freeport, and coming off the Illinois Central at that point. This Chicago business would pass 42 miles over the Racine road.

Taking into account then the way business between Beloit and Freeport, the Freeport business, the business coming from the Illinois Central both ways at Freeport, the Chicago business which will pass over the Racine road, and we think its stock at least five per cent. better than it was at Beloit.

Savanna is 36 miles from Freeport, 30 from Galena, and 20 from Fulton. From Freeport to Savanna the road has a margin of country exclusively its own, at least twenty miles wide, equal in fertility to any which has been passed before, and still further from market. The road would draw business west of the Mississippi for a circuit of twenty miles around Savanna.

From Dunleith to Chicago, by the Illinois Cen. and Chicago and Galena, the distance is 193 miles. From Savanna to Racine it is only 138 miles, giving 53 miles the advantage. Now the business of the Upper Mississippi with the lakes must be done across our road, or else it will be done at a loss.

We say the road will pay twenty per cent. dividends as soon as it reaches Savanna.

Sabula is a village now containing 900 inhabitants. It is nearly opposite Savanna, and is the only landing of note on the west side of

the Mississippi between Dubuque and Lyons, a distance of 60 miles; as Savanna is the only landing on the east side between Dunleith and Fulton. Both of these places have very convenient landings, as good as can be found anywhere upon the Mississippi. The best portion of Iowa lies directly west of Sabula. It was settled before the lands were brought into market, and is, to-day, the most populous and wealthy part of the State. When there was a prospect that the Chicago, St. Charles, and Mississippi Air-line would be built to Savanna, a company was organized to build a road from Sabula west to Cedar Rapids, about 80 miles, and very heavy subscriptions were taken upon the line of the road. The country west of Sabula must have an outlet, and it is entirely able to build its own road, as soon as one reaches the Mississippi from the east. Intelligent men at Freeport, Mt. Carroll, Savanna, and Sabula, speak of it as a certain thing that such a road will be built as soon as the Racine road reaches the Mississippi. The construction of such a road would make the stock of the Racine road pay five per cent. more.

We have at this point a stock paying twenty-five per cent. dividends.

I know that this estimate might be considered extravagant by those not acquainted with the business of this country, and that all paper estimates are distrusted. We can better test the matter perhaps by comparing this road with those which are situated nearest like it.

Take first the Chicago and Galena road, those who had stock in this road four years since, have received in stock and cash during that time about 200 per cent. or upon an average 50 per cent. I should not have credited this, if I had not received the information from various sources which I consider entirely reliable. The greater portion of this amount has been paid in stock, which was worth a great deal more than money. This amount has been paid too when it was only in August, 1853, that the road reached Freeport, and it did not reach Rockford until the year previous.

Suppose our road finished to the Mississippi by October 1st, 1857, what might its next year's earnings be compared with those of the Chicago and Galena for the past four years? It has some decided advantages. It passes through a much better and far more populous country than does the Chicago and Galena, and its way business must be much greater. At Freeport, while it will divide equally with the Galena road all the Chicago business from Freeport, and conveying off the Illinois Central at that point, it will have in addition all the business going to Racine, and besides all the business coming off its own road west of Freeport. Must not this road then when it reaches the Mississippi, pay as much as the average of the Chicago and Galena road for the past four years?

Compare it with the Milwaukee and Mississippi road. The receipts upon this road for 1855 were $650,000, although it was but 100 miles long, has no railroad connections, meets no thoroughfares at its terminus, and passes through a country much inferior to that along the line of the Racine road. To make the Racine road a ten

per cent. stock at Savanna, 138 miles long, its receipts would have to be but $575,000. Perhaps this comparison with the Milwaukee road is more satisfactory than with the Chicago, for the former terminates upon the side of the lake, as does ours.

The whole tract of country which we make directly dependent upon this road is 57 townships, or 2,052 square miles. or 1,313,280 acres. There is scarcely one acre of this upon the whole route which is waste land. There is no other strip of country lying between Lake Michigan and the Mississippi to be compared with it. None of the other railroads running westerly from Lake Michigan, have such a way country. If only three bushels to the acre were sent to market from this region of country, and the return freight were only two-thirds as much, it would make the stock more than at 10 per cent. stock without including the passenger traffic, or any other kind of business.

This road is the only one running southwesterly, which connects Wisconsin with Illinois. Wisconsin now contains 550,000 inhabitants, and will soon have a million. If any of these persons should wish to pass into Iowa upon any of her roads leading either from Dubuque, Sabula, Lyons, Davenport, or Burlington, or should wish to pass to any part of Illinois along the line of the Illinois Central from Freeport to Cairo, they would naturally pass over our road as far as Freeport.

From Milwaukee to Prairie du Chien, by the Milwaukee & Mississippi road, the distance is 202 miles. From Milwaukee to Savanna by one road it is 160 miles, and to Dunleith by our road and Illinois Central it is 196 miles. It is believed that there will be more travel from Milwaukee to the Mississippi over our road, than over any other road going directly from that place to the Mississippi.

All that part of the Racine road lying west of the Chicago, St. Paul, and Fond du Lac road, being 78 miles, is a joint road to Racine, Milwaukee and Chicago. All that part east of Freeport, being 102 miles, has two outlets upon the Mississippi at Dunlieth and Savanna. No other road running from the lake to the Mississippi has two terminations upon the Mississippi, nor has any other one two terminations upon the lake. The east sixty miles has the most populous part of Wisconsin as a way country; all the business which it can draw from the west to Racine, and all the travel from Wisconsin in that direction west to support it; and the west 78 miles will be as direct an east and west road leading into Chicago, as any other; and more so than any other, except the Chicago & Galena.

Let us think over, now, all the causes which have tended to injure railroad stocks anywhere, and see if any of them will apply to this road. For it is better for all parties to know the truth as soon as possible.

Many roads are too short, and therefore do not pay. That does not apply to this. Many are too long, and the affairs of the company are on too grand a scale, and it is impossible that there be a close supervision and direct responsibility everywhere. These great companies find the same difficulty in getting an economical management of their affairs that government does.

The stock of many roads has been injured by some better route which has been opened subsequently. Now the lakes must always transport the heavy products of this country, and the travel and business of this country must be to the Eastern cities. No shorter and more direct route can be obtained than this road offers. There is not a road talked of anywhere which would affect the business of this road. By the Chicago, St. Paul, and Fond du Lac road, and the Racine road, a second road is opened to Chicago, but this was not the original design of either of the companies. It is very improbable that a third road will ever be built from Freeport to Chicago.

The only competition which this road meets with really, is the Chicago and Galena road. That road is now earning enough to make five roads pay ten per cent. These roads do not come into close competition except at Beloit and Freeport, and a portion of the country between these points, leaving over 100 miles of our road without competition. It is generally conceded that there will be more business than both roads can do. Stage companies sometimes undertake to ruin one another by low prices, as it is practicable to do so. But a railroad is a permanent thing, and it is impossible to prevent its being run by adopting low prices. Hence all competing railroad companies agree upon prices, although they may agree upon nothing else. Hence this competition will not produce any reduction of prices.

But the most fruitful source of poor stocks is the mismanagement of the directors. I propose to dwell fully upon this point, and to notice in detail the various causes of mismanagement.

1st. Many a road has gone around to small towns after stock, and these have been built so crooked that it was liable to be ruined by air lines. The Racine road has not swerved a rod from the most direct and practicable route from the lake to the Mississippi.

2d. Many and many of the best roads in the world have been ruined by the building of branches, or by injudicious contracts with other companies, or by investing their means outside of the legitimate objects of the company. The Racine road has not a contract with any other company whatever. The board of directors have passed a resolution unanimously, that they will never build any branch until the question has been first submitted to, and approved by a majority in the interest of the stockholders.

3d. Roads built by contract, where the contractors build and equip them for stock and bonds, usually cost from thirty to fifty per cent more than they ought to, and are very poorly built at that. The directors of the Racine road have built it themselves for cash. They purchased the iron for the road from Racine to Beloit at $100,000 less than Col. Mason's estimate of its cost. They secured ample depot grounds at Racine and Beloit at an early day, and at very low prices. The depot grounds at all of the intermediate points have been donated. All the work which has been done upon their road has been done thoroughly and substantially.

4th. The stocks of many companies are fixed on purpose to sell. The certificate of stock which purports to represent $100 paid in for

each share, does not truthfully state the fact. The Racine company has not issued a certificate for a single share, except for real and full value. It has not used its stock at all in construction, except it has paid for its safes and scales with it, and for a part of its track laying. Its stock is, with the above exceptions, all subscribed stock, bona fide, and nine-tenths of it actually paid in or secured.

But not to dwell longer upon details. The great fact that over three millions of the stock has been subscribed along the line of the road, by about 2,500 persons, while the whole road, at $25,000 per mile, will cost but $3,450,000, gives the strongest and the most permanent guaranty that the road will be well managed that ever can be made. Such a heavy local subscription is entirely unexampled in the history of railroads at the West, certainly, and I believe it is in the whole United States. This is well. Railroads are public institutions. The communities interested should build, own, and control them. Such important interests should not be abandoned entirely to the management of foreign capitalists. The directors of this road all reside upon the line of the road, and give their best attention to the interests of the company. They are not mere nominal directors. No one or two men control the direction. The road, instead of being a lien, and odious to the communities through which it passes, as many railroads are, is everywhere called "our road," and is thoroughly ingrafted into the good feelings of the people.

The subscribers are so unanimous that no few men can combine and seize the management of the road; no favoritism can be practiced; the eyes of the principals will be everywhere. A conductor can scarcely run a passenger train without having stockholders in it. Each station agent will be surrounded by them. The landholders through which the road passes will be interested in keeping the fences up, and cattle and other obstructions off the track. The road will have along its line 2,500 interested agents to secure it business. Where it comes in competition with other roads, as at Beloit and Freeport, other things being equal, the whole community will be interested in giving their business to the Racine road.

We conclude, then, that the road is amply and permanently guaranteed against all the evils arising from mismanagement.

Perhaps the cost of the road should be noticed more particularly. Col. Mason estimated the cost from Racine to Beloit, 68 miles, at $1,386,000, a trifle more than $20,000 per mile.

He included in this estimate $175,000 worth of equipments; but he did not include the cost of the depot grounds, nor the interest accruing during construction, nor the discount on securities. The company have purchased the iron for this part of the route for $100,000 less than the estimate—the other materials and grading have also come below the estimate. Preliminary surveys have been run from Beloit to Savanna, and it is expected that this part of the route will not be more expensive than that east of Beloit; hence it is believed that $25,000 per mile will cover every expense which should enter into the construction account, and provide at the same time for a very large equipment. It is thought that thirty engine

and five hundred freight cars will be needed immediately upon the completion of the road.

The subscribed capital of the company is so large that it will give it good credit, and effectually secure it against that blighting cause, a floating debt.

The road will be immediately profitable, and there will be but little loss of interest during construction. The country through which it passes is not only the most fertile between the lake and the Mississippi, but the most populous. The whole of this country was settled upon before it was brought into market, and there are but few non-resident lands in it. This company does not have to build up a road, and build up a country too, as the Illinois Central does in many places.

The stock of the company is so large, and the project itself, compared with many others, so small, that the earnings can go immediately to the stockholders. Many companies are obliged to retain their earnings either to pay off their indebtedness or to continue their construction. The road is now completed to Delavan, 46 miles. It will be finished to Beloit next July, at which point it will certainly pay well. During the year 1856 it will be finished to Freeport, and the next summer to Savanna.

An English writer has stated that the receipts of every trunk railway in England have been greater each succeeding year, from the time of their completion, than they were the preceding year. This too, although some years have been remarkable for prosperity and business activity, and have been followed by years of hard times and dull business, yet the receipts during the dull year were a little greater than they were the prosperous year. Hence he remarked that railroads seemed to have an immortal youth, and never to arrive at maturity. If this remark is true of old crowded England, with how much greater force will it apply to these Western States.

A farmer's occupation may be unprofitable from two causes: either a failure of his crops, or if he has good crops, from inadequate prices. Yet the occupation of the farmer is considered the safest in the world. But although crops may be light, yet from the general advance of the country, the railroad will have more to carry each year than it had the year before. If the prices of crops are low, the railroad still has the same price per bushel for transportation.

Railroad prices here are not likely to be reduced below a remunerative compensation. In the Eastern and Middle States, great cities are contending for the trade. Each railroad there comes in competition, in a manner, not only with various other railroads, but with different means of water communication. The competition here will be confined to two or three railroad companies.

The rapid progress of business at the West, is deserving of more particular notice in this connection. It is estimated that more new lands were broken up and brought under cultivation last year along the route of the Racine road, than there had been for three years previous. Yet the resources of this immediate country are not one-

sixth part developed. And what shall we say of Iowa? It is estimated that 100,000 emigrants went into the northern part of Iowa during the last year. They came from all of the New England States, from the Middle States, from Ohio and Indiana, and from many of the Southern States, besides all those from foreign countries. Day after day an hundred emigrant wagons passed through Freeport, besides three trains a day, and all those who passed by other routes through Illinois, or came up the Mississippi by boats. The like of it was never seen in emigration before. Very many of them were persons of low means, and took along with them droves of cattles and other live stock. In the prairie country of Iowa these settlers raise the present year large crops for export. Hitherto, the productions of Iowa have been mostly consumed by the immigrants, but when the surplus comes, as it must speedily, her exports will be immense. During the last five years the population of Illinois has increased 500,000, and that of Wisconsin 250,000. The whole business of the country has more than doubled within that period. If we look forward five years, how can we estimate the progress of the country. From all accounts, the emigration to the West will be greater than ever the present year; and it will doubtless continue to increase from year to year. Within that period Iowa will become an immense exporting State. Railroad cars seem too small and inadequate to carry away, over such long distances, the bulky agricultural productions of such an immense fertile region. Were there no other outlet, the business of the Chicago and Galena road would be more than doubled, and doubtless it will be as it is. It has never been able to supply the country with lumber, or to carry away its grain, with any degree of promptness, and the country must still continue to suffer for the want of railroad facilities. The present profits of roads running westerly from Lake Michigan, are but a small fraction of what they must be a few years hence.

It may be asked if this stock is likely to prove so profitable why do not capitalists invest in it? Those living upon the line of the road have done so to a greater extent than was ever done before. This too, when money in this country, owing to the many opportunities there are for profitable investment, is worth from one to two per cent. a month. But Eastern capitalists cannot understand the West. You may write to your own friends and relatives at the East year after year about the West—you may tell them personally about it—they cannot realize it. There is nothing in their experience to justify it. However highly they may esteem you, they cannot but think that you are somewhat wild. No Eastern man appreciates the West until he has travelled and spent sometime in it.

Considering then the low cost of this road—the cheapness of its running expenses—the high prices paid for railroad transportation in this region—the highly favorable direction of the road—its facilities for doing the lumber business—its freedom from competition with water communication—the vast country west of the Mississippi to furnish it with business—the great margin of way country which it has and its unexampled fertility—its short route between the lake

and Mississippi—its many valuable railroad connections—its advantages for a passenger thoroughfare—the enormous profits of all the roads in this vicinity similarly situated—the amount of subscribed stock—the management of the company—and after industriously hunting up every imaginary possibility which could injuriously affect the stock, we are driven to the conclusion that it is absolutely certain that the stock must pay at least ten per cent. And that it is morally certain that it will pay more than twenty-five per cent.

MARSHALL M. STRONG.

Exhibit B.

DIRECTOR'S REPORT TO THE STOCKHOLDERS.

GENTLEMEN: Since our last report, the transactions of the board have been important, and generally successful. In submitting their third annual report, it affords them great pleasure in being able to announce forty-seven miles of your road completed and in successful operation, viz., from Racine to Delavan. This event was appropriately celebrated by the people of Delavan and Walworth county, on the 31st ult.; and from the vast concourse of people assembled on that occasion, we had most flattering evidence of the interest felt by the community at large, in the progress and success of the work. The policy of raising the means chiefly by subscriptions on the line of the road, and the plan of taking in payment well-secured bonds and mortgages on improved farms, has not only found great favor with the people, but has thus far resulted most successfully to the company. It will be recollected that at the date of our last report, but little, comparatively, had been done in the way of construction, and the ways and means then on hand were anything but money. In May last the first purchases of iron were made, and it was near the middle of July before the track-laying was commenced. Frequent interruptions occurred by reason of delay in shipments of material, and also from the backwardness of the grading. The fall was most unpropitious for this kind of work, and since the winter set in the weather has been unparalleled in severity. The money market has been uniformly stringent, and railroad securities have for the most part been completely ignored by capitalists. Yet, amid all of these unfavorable circumstances, we present you, to-day, your road and property in the following condition:

47 miles of the main line, with about 3½ miles of side-track, completed and in operation.

The grading from Delavan to Beloit, 21 miles, is more than two-thirds done.

1,993 tons of iron on hand, ready for use; also, wrought-iron chairs for 21 miles.

250 kegs spikes.

20,000 ties.

7 locomotives (2 more to be delivered this month.)

84 first class 8-wheel freight cars.

4 first " passenger coaches.

2 baggage cars.
5 hand cars.
1,000 car wheels.
500 " axles.
Lumber and timber for 120 freight cars.
120,000 feet fence lumber and posts.
About 35 miles of fence erected.
" 18 miles of road ballasted.

Buildings.

Depot at Racine, 28 by 180, completed and furnished.

Brick engine-house, 183 feet in diameter, with 13 stalls, completed and furnished.

Brick blacksmith shop and stationary engine-house, 50 x 70, completed and furnished.

Stone foundation to machine shop, 60 x 120.

One car-house, 30 x 120, completed.
" shop, 36 x 50, do.
" " 30 x 60, do.

One superior turn-table, complete.

Depot at Union Grove, 20 x 50, completed and furnished.

Water station do. do.

Depot at Burlington, 20 x 96, do. do.
Engine-house do. 30 x 60, do. do.
Water tank do. do. do.

Depot at Springfield, 24 x 96, furnished.

Water station do. complete, do.

Depot at Elkhorn, 24 x 29, do.

" at Delavan, 24 x 96, nearly completed.

Engine house, 30 x 60, complete.

One good turn-table at Delavan, complete.

Water station do. do.

Temporary buildings have been erected at Lyons and Dover; and ample side-tracks for present use, have been put in at all the above stations.

Four water stations in complete working order are now on the line. and are sufficient for the present.

We have in hand, ready to put up, one 30-horse-power stationary engine, with boiler, shafting, &c., complete.

Also, all of the necessary machines and tools for the repair shop.

All of the station buildings are well furnished with scales, safes, desks, and other necessary furniture.

The right of way and land damages from Racine to Beloit, have been settled; eligible and ample depot grounds obtained at all of the way stations.

The depot grounds belonging to the company in the cities of Racine and Beloit, have often been referred to; but from their extent and value at this time, the board take pleasure in again calling your attention to them, as it is an item second only in impor-

tance to the grading or iron for the road. We now own more than twenty acres of ground in the centre of the city of Racine, with a river frontage of over three quarters of a mile, and worth, at the lowest estimate, two hundred thousand dollars. In Beloit, we have extensive and convenient grounds, worth in cash at this time, over fifty thousand dollars. The company own, in addition, over four thousand acres of choice farming lands, taken in payment of subscriptions to stock, and worth at this time full fifty per cent. more than their cost. By reference to the report of the secretary, it will be seen that this entire property has cost the company but $76,882 44, while the board feel justified in estimating it worth now in cash, $310,000. The farming lands will be sold hereafter, and may be added to the present assets at $60,000.

It will be seen from the report of the secretary, that the total subscriptions to capital stock, amount to the sum of	$1,826,000 00
($540,000 of this sum has been paid by 7-per cent. city and town bonds, $490,000 of which have been negotiated, netting the company a little over 87¼ cents on the dollar.)	
Total receipts to subscriptions on capital stock	$921,905 96
Total disbursements on account of construction, equipments, lands, interest, &c	$1,289,321 17
Add cash on hand	25,304 59
The present liabilities of the company of every kind, including permanent loans, and covering all materials on hand, amount to the sum of	380,715 12
(The company has, as yet, no bonded debt whatever.)	
The total resources amount to	1,585,094 04
Including $680,000 of 1st mortgage 8-per cent. bonds, on 68 miles of road from Racine to Beloit, and cash on hand	25,304 59

For details of receipts and disbursements, together with the resources, &c., reference will be had to the secretary's report annexed.

Subscriptions are now being taken on the western division of the road, between Freeport and Savanna; and from the liberal manner in which the people of that section are taking hold of the work, there is but little doubt the entire means to complete the road to the Mississippi river will be raised, and that there will be no occasion to mortgage the balance of the road. Should this be realized, the present small issue of $680,000 8-per cent. bonds on a road 136 miles long, costing about $3,000,000, connecting Lake Michigan with the Mississippi river by the shortest possible line, and running through the best settled and most productive country in the West, must certainly be regarded a very rare security.

Until recently, our entire project has been the construction of a road from the city of Racine to Freeport; there depending on a connection with other lines for access to the Mississippi river. Yet, while this has been considered a very strong and promising project, there have always been misgivings in the minds of the directors, as to the policy and expenditure of upwards of two millions of dollars on a road, without a more reliable western terminus. Besides this, the business now done on the upper rivers is immense; a due share of which would of itself afford a remunerative traffic to your road, could it be reached. In view of this and other considerations, which will be hereafter mentioned, the board have recently formed and perfected a consolidation with the Freeport and Savanna Railroad Company, styled in their charter, "Savanna Branch Railroad." This arrangement has been hailed with great satisfaction by our own stockholders and public, as well as by the people of that section of country and central Iowa. This will only increase the length of our road about thirty-four miles, which still keeps it within a limit for the most economical working, and at the same time opens up a country that will furnish a business of almost unlimited extent, and places our project in the very front rank, in point of traffic and profit, while it will confer untold benefits upon the country through which it passes. The enthusiasm of the people of Stephenson and Carrol counties, together with the liberal stock subscriptions which are now being made, insures the completion of the entire road at a very early day. The line from Freeport to Savanna, has been thoroughly engineered and located, a considerable portion of the right of way procured, and eligible depot grounds, with a river frontage of 1,200 feet in Savanna, are now owned by the company. This arrangement is regarded with no less interest and satisfaction by the people of Sabula and central Iowa, as it affords a short and direct outlet to Lake Michigan, and will soon insure the construction of the "Iowa Central Air Line Railroad" ($1,200,000 stock having already been raised for that purpose, on its line.)

Another matter of hardly less importance to our company, is the business connection with the Chicago, St. Paul, and Fon du Lac railroad, which will soon be completed from Chicago to Janesville, and which crosses our line at Clinton, 58 miles west of Racine and 78 miles east of Savanna. By reference to the "table of distances," hereto annexed, it will be seen that this arrangement forms a line from Savanna to Chicago, 22 miles shorter than from Galena to Chicago. by Galena and Chicago railroad; 5 miles shorter from Freeport to Chicago, and 15 miles shorter from Beloit to Chicago. This must throw an immense passenger as well as freight business, on to the west 78 miles of our road, while at the same time it places us in direct communication with the city of Janesville and the roads running therefrom. The Beloit and Madison railroad is making good progress, with 20 miles now in operation. This line will be completed to Madison during the coming season, and will prove a most valuable tributary to our road, while we shall probably more than reciprocate the benefits derived therefrom.

At the last session of the Illinois legislature, an act was passed chartering the Rockford Central Railroad Company, under which the people of Rockford have perfected an organization with a view of connecting the city of Rockford with our road at Rockton, and ultimately extending the line down the Rock river Valley to Mendota or Dixon. The division from Rockford to its connection with our line at Rockton, has already been surveyed and prepared for letting. The requisite means for its construction have been secured, and the work will be speedily commenced. This connection will furnish to the city of Rockford an outlet to Lake Michigan at Racine, by a line ten miles shorter than their present road to Chicago, besides giving them the advantage of a Wisconsin market for their produce, (an item now well understood and appreciated by the people of northern Illinois generally.)

The board have observed, with much satisfaction, the progress of the Detroit and Grand Haven railroad, and are happy to learn that sixty miles is now in operation, with a good prospect of its being fully completed to Grand Haven during the next eighteen months. To the completion of this road, the people of southern Wisconsin are looking with great interest; and as an outlet to a large and rapidly increasing business in our region, its importance cannot well be overrated. To our road it will prove a most valuable auxiliary.

Good and responsible parties stand ready to put on a line of first class steamers between Racine and Grand Haven, immediately on its completion.

The several routes eastward from Racine, will be as follows, viz:

TO BUFFALO.

By Grand Haven and Detroit.....	513 miles.
" Chicago, Mich. Central and Canada railroad.....	593 "
" " Mich. Southern and Lake Shore.....	590 "
" Collingwood and Toronto.....	
" the Lakes.....	866 "

By these various routes, it will be seen that Racine has every facility possessed by any other lake city for communication with all parts of the world.

On the 4th inst., two regular trains commenced running between Racine and Delavan, twice a day, each way, carrying both freight and passengers, and making regular connections with all trains on the Lake Shore railroad. It was expected that these trains would be sufficient for the winter; but, during the first week it became necessary to run four extra trains each way, to do the business offered. The incidental business taken up by the construction train, to 1st of January, amounted to over $12,000, which was chiefly from passengers, as the large quantities of material duly used in construction, demanded nearly all of our means of transportation up to that time. The business of the road is daily increasing in both freight and passenger traffic. The passenger business is very far beyond our expectations,

and already demands increased facilities, hence, three more first class passenger cars have been ordered. Contracts have been made with the Post-Office Department, for carrying the mails, and also with the American Express Company, for extending their business over the road; and the service for each has already commenced. The board have deemed it unnecessary to speak particularly with reference to the character of the work completed, as so large a proportion of the stockholders have recently had an opportunity of examining it in person. All of the freight cars, with the exception of twenty, have been manufactured at our own shops. The cars of our own manufacture are very far superior to those generally made to sell, as no pains are spared either in materials or workmanship. Besides this, we find them to cost us less than the inferior cars we should be obliged to purchase. When our road is completed through to the Mississippi river, not less than five hundred freight cars will be required to do the business, even though the roads with which we connect, should furnish their proper share. In view of this increase of equipments, we have already procured the materials for one hundred more freight cars in addition to the one hundred now being finished. This will give us two hundred and twenty of the largest size freight cars during the coming season. Increased facilities for this work are much needed, which, however, the early completion of the new shop will afford.

The present total liabilities of the company of every kind is $380,715 12, about one-half of which is in the shape of permanent loans; and the balance being for materials, will mature in from one to fifteen months.

The estimates for the completion of the road to Beloit may be stated as follows, viz:

To complete the grading, masonry, and bridging	$21,000 00
Balance of ties	8,750 00
" of spikes	3,000 00
" 500 tons more iron	35,000 00
Laying track and dressing up	8,000 00
Ballasting	50,000 00
Fencing and cattle-guards, complete	37,500 00
Buildings	10,000 00
3 more locomotives	28,500 00
3 more passenger cars	6,600 00
100 more freight cars	60,000 00
Engineering, interest, and expenses	30,000 00
	298,350 00
Add present expenditures	1,289,321 17
Total cost of 68 miles	$1,587,671 17

Or about $23,348 per mile.

A considerable amount, included in the above disbursements, has been expended in the surveys, and procuring of right of way on the western division. Many other items, such as expenses of organization, interest, expense account, and other sacrifices incident to a new undertaking, might be properly apportioned on the other half of the road; besides this, the present equipments, depot grounds, repair shops, &c., at Lake terminus, will be sufficient to operate the whole line, with the exception of cars and locomotives; so that it may be deemed a perfectly safe calculation that the cost per mile of the work thus far completed will be a full average of the whole line.

The policy of the board has been to push forward the work as fast as the means and credit of the company would permit, having, at the same time, a proper regard to the safety of the enterprise by being able to honor our engagements without too much sacrifice. This, we believe, has been fully carried out, and that the credit of the company justly stands high at home and abroad.

The prospects of the company were never more auspicious; the importance of the work and value of the stock never so well appreciated by the public at large, and its early completion to the Mississippi river never so urgent. In order to meet promptly every demand, and at the same time to prosecute the work with vigor, the board have deemed it best to execute a mortgage on the first division of the road, viz: from Racine to Beloit, sixty-eight miles, to secure bonds to the amount of $10,000 per mile, bearing interest at 8 per cent., and running twenty years; and dispose of the whole or a portion of the issue whenever a fair price can be obtained. The Farmers' Loan and Trust Company, in the city of New York, has been selected as the trustee; and the mortgage provides for a sinking fund from the earnings of the road, which, we think, will be sufficient to redeem all the bonds before their maturity, besides paying the stockholders fair dividends.

The road has already reached a paying point, and the property covered by the mortgage has already a fixed value of more than twice the amount of the bonds; besides this, the daily receipts already demonstrate the capacity of the portion now in operation to provide for the interest upon the whole issue from its net earnings. These bonds have been made convertible during the whole term, and there is not the slightest doubt of their being qualified for a banking basis, under the general banking law of Wisconsin, during the current year.

By order of the board:

HENRY S. DURAND, *President.*

Racine, Wis., February 1st, 1856.

OFFICE OF RACINE AND MISSISSIPPI RAILROAD COMPANY,
Racine, February 1st, 1856.

To the Board of Directors of the Racine and Mississippi Railroad Co.:

GENTLEMEN: I herewith present you a general statement of the affairs of this company, including total receipts and disbursements, from its organization, September 20th, 1852, to 1st February, 1856:

Total subscriptions to capital stock		$1,826,000 00
as follows:		
Corporate subscriptions, paid in bonds..	$540,000 00	
Individual subscriptions	1,286,000 00	
Receipts:		
On subscriptions to capital stock, individual and corporate, (converted into cash)	921,905 96	
From income to January 1st, 1856	12,004 68	
Bills payable, including loans and discounts	380,715 12	
		1,314,625 76
Disbursements:		
For grading, masonry, and bridging	333,148 63	
For rails	367,431 85	
For chairs and spikes	31,127 91	
For ties	36,643 33	
For equipments, including passenger and freight cars	155,817 70	
For tools and machinery	7,811 47	
For oil and waste	1,442 03	
For fencing	6,878 48	
For buildings	18,127 89	
For personal property	2,301 86	
For depot grounds and real estate	76,882 45	
For right of way	56,621 69	
For engineering	22,159 52	
For expense account	26,940 75	
For salaries	26,972 95	
For discount on city and town bonds	61,659 50	
For exchange	6,766 25	
For taxes	357 03	
For interest	46,496 49	
For printing and stationery	500 83	
For rents	207 38	
For commissions	3,025 18	
For cash on hand	25,304 59	
		1,314,625 76

Resources.

Balances of subscriptions to capital stock, viz:		
Bonds and mortgages on real estate	160,000 00	
Bonds of the town of Beloit	43,000 00	
Bonds of the town of Rockton	50,000 00	
Bills receivable	68,523 69	
Subscriptions subject to calls	583,570 35	
		905,094 04

First mortgage 8-per cent. bonds, on 68 miles of road from Racine to Beloit		680,000 00
		1,585,094 04
From which deduct liabilities	380,715 12	
Less cash on hand	25,304 59	
		355,410 53
Leaving assets on hand after paying liabilities		$1,229,683 51

Respectfully submitted,

A. J. REDBURN
Secretary.

Table of distances.

Savanna to Chicago by Galena and Chicago railroad	157 miles.
" " by R. & M. & C. & St. P. railroad	152 "
Freeport to Chicago by G. & C. railroad	121 "
" " by R. & M. & C. & St. P. railroad	116 "
Beloit to Chicago by G. & C. railroad	99 "
" " by R. & M. &. C. & St. P. railroad	84 "
Freeport to Racine	101 "
Beloit to Racine	68 "
Dubuque to Racine	167 "
Galena to Racine	150 "
To Chicago, by G. & C. railroad	121 "
To " " "	99 "
To " " "	188 "
To " " "	171 "
Savanna to Buffalo, via. Racine & Miss. and Grand Haven & Detroit R. R	649 "
Dubuque to Buffalo, via. Racine & Miss. and Grand Haven & Detroit R. R	682 "

Distances between stations on Racine and Mississippi railroad.

Racine to East Mount Pleasant	5	miles.
" Windsor	10	"
" Union Grove	15	"
" Dover	20	"
" Burlington	26	"
" Lyons	31	"
" Springfield	34	"
" Elkhorn	41	"
" Delavan	47	"
" Darien	51	"
" Allen's Grove	55	"
" Clinton	59	"
" Beloit	68	"

Racine to Rockton	71	"
" Harrison	79	"
" Picatonica	88	"
" Freeport	101	"
" Mount Carrol	122	"
" Savanna	136	"
" Janesville	72	"
" Rockford	84	"
" Galena	150	"
" Dubuque	168	"
" Mineral Point	151	"
" Madison	161	"

Population of counties.

Racine county	22,000
Walworth county	29,000
Rock county	36,000
Winnebago county	34,000
Stephenson county	26,000
Carrol county	17,000
Total	164,000

Population of cities.

Racine	10,500
Beloit	5,000
Janesville	6,000
Freeport	5,500
Rockford	7,500
Galena	14,000
Dubuque	12,500
Total	61,000

170 OFFICE OF RACINE & MISSISSIPPI R. R. Co.,
Racine, April 1st, 1856.

Since the publication of the foregoing report the entire issue of $680,000, of first mortgage bonds therein referred to have been negotiated on very favorable terms; the subscriptions to the capital stock of the company have been increased to upwards of three millions of dollars, and a large portion of the indebtedness of the company has already been paid off:

7,000 tons of iron, together with all of the spikes and chairs necessary to complete the whole road to the Mississippi river have been purchased, and will be shipped early on the opening of the lakes, also

14 new locomotives, (five of which are now on the way.)
5 passenger cars.

1,600 car wheels.
800 car axels.
200 setts car springs.
200 tons bar-iron for car and repair shops, together with all of the small articles required for the completion of the whole work.

Contracts for the transportation and insurance of all of the
171 above materials are made for the season. Most of the ties to lay the entire line are contracted, and being rapidly delivered on the line.

The work between Delevan and Beloit is going forward rapidly, and will be opened as soon as we anticipated.

On the 15th of next month the entire work from Beloit to Savanna is to be placed under contract, with a view of completing the same this year.

For this purpose a portion of the iron is now at New Orleans, ready for shipment to Savanna immediately, to commence construction also at that end. The road now in operation to Delevan is in full running order and doing a satisfactory business.

H. S. DURAND, *President.*

172 Mr. DeWolf offers in evidence a copy of the mortgage made by the Racine and Mississippi Railroad Company on the first day of September, 1855, to the Farmers' Loan and Trust Company, $680,000.

(Objected to on the ground of incompetency.) Admitted subject the objection.)

173 RACINE AND MISSISSIPPI RAILROAD CO.
to
FARMERS' LOAN AND TRUST CO.

This indenture, made this first day of September, 1855, between the Racine and Mississippi Railroad Company, a corporation created by or under the laws of the State of Wisconsin, parties of the first part, and the Farmers' Loan and Trust Company, a corporation created by or under the laws of the State of New York, parties of the second part.

Whereas, the parties of the first part, pursuant to the terms of the statute of the said State of Wisconsin incorporating them, and other statutes of said State affecting them, are engaged in constructing a railroad from the city of Racine, to the town of Beloit, in the said State of Wisconsin, and for that purpose need are desirous of raising the sum of six hundred and eighty thousand dollars, and to secure the payment of said sum of six hundred and eighty thousand dollars,

design to execute, issue, and deliver six hundred and eighty
174 bonds or writing obligatory, each for the sum of one thousand dollars, with interest at the rate of eight per centum per annum, payable semi-annually at the office of the said Farmers' Loan and Trust Company, in the city of New York, on the first day of February and August in each and every year, and the principal of

said bonds being payable on the first day of August, one thousand eight hundred and seventy-five, at the office of said Farmers' Loan and Trust Company, in the city of New York, said bonds all to stand equally secured according to their ammounts, by these presents, and to be the following form, that is to say:

Copy of Bond.

United States of America.

No. State of Wisconsin, $1,000. The Racine and Mississippi Railroad Company. First mortgage convertible bond.

Know all men by these presents:

That the Racine and Mississippi Railroad Company acknowledge themselves indebted to the Farmers' Loan and Trust Company of the city of New York, trustees or bearer, in the sum of one thou-
175 sand dollars, which sum the said railroad company promises to pay to the holder thereof, on presentation of this bond at the office of the Farmers' Loan and Trust Company, in the city of New York, on the first day of Agust, in the year one thousand eight hundred and seventy-five, with interest thereon at the rate of eight per centum per annum, payable semi-annually on the first day of February and August in each year, untill said principal sum shall be paid, on presentation of the annexed interest warranty at the office of the said Farmers' Loan and Trust Company, and they hereby waive all benefits of valuation or appraisement laws: The holder of this bond shall be entitled at any time, within twenty years from the date hereof, to convert the principal sum into the stock of the said railroad company as par, ($100 per share,) on the surrender of this bond, with the unpaid interest warranty annexed. This bond is one of a series of six hundred and eighty of like tenor, date, and amount, the full payment of which is secured by one indenture of mortgage,
176 dated the first day of September, 1855, on the said railroad, its equipments, appurtenances, and franchises, executed and delivered to the Farmers' Loan and Trust Company, and duly recorded, which is the first mortgage upon said premises, and for the better security of the payment of the principal of said bonds.

In conformity with the promise herein contained, the Racine and Mississippi Railroad Company hereby agree and pledge themselves to appropriate each year out of the net earnings of the road, after payment of the interest on the debt of the company, a sum equal to one and one-half per cent. on the amount of bonds secured by the above named indenture of mortgage, as a sinking fund, to be placed in trust and used in the purchase and extinguishment of said bonds.

In witness whereof, and in pursuance of a resolution of the board of directors, passed August 27th, 1855, the corporate seal of the said Racine and Mississippi Railroad Company is hereunto affixed this first day of September, 1855, and these presents duly signed by the president and secretary.

[SEAL.] ——— ———, *President.*

———— ————, *Secretary.*

177 This is to certify, that the above bond is included in a mortgage, dated September 1st, 1855, on the Racine and Mississippi Railroad, and the equipments, appurtenances, and franchises of the company, executed to the Farmers' Loan and Trust Company of the city of New York, in trust and for the use and benefit of the holders of the obligations of the said railroad company, of same date and tenor, and not exceeding in all six hundred and eighty thousand dollars, with power therein contained to take possession of, use, and sell the same, or any part thereof in case of sixty days default in paying the interest or principal of said bonds or any of them, which mortgage has been recorded in the several counties in which said railroad is located, and is the first mortgage executed by said company, on the premises therein mentioned.

[Coupon.] $40 00.

The Racine and Mississippi Railroad Company will pay to the bearer hereof, at the office of the Farmers' Loan and Trust Company, in the city of New York, forty dollars on the first day of
178 for interest to that date, on their bond No. for $1,000, dated September 1st, 1855.

——— ———, *Treasurer.*

Now, therefore, this indenture witnesseth that the said parties, of the first part, the better to secure the payment of the said bonds, with interest, at the times and in the manner therein mentioned and set forth, and for and in consideration of the sum of one dollar, by the parties of the second part in hand, paid to said parties of the first part, on or before the unsealing and delivery of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, transferred, and set over, and by these presents do grant, bargain, sell, transfer and sett over to the said parties of the second part, their successors and assigns forever, all the following property of the said parties of the first part, that is to say: all their railroad, with its superstructure, track, and all other appurtenances made, or to be made, in the State of Wisconsin, from its east-
179 ern termination in the city of Racine, to its western termination, in the town of Beloit, and all the right and title of the said parties of the first part, to the land on which said railroad is and may be constructed, together with all rights of way now acquired and obtained, or hereafter to be acquired or obtained by the said parties of the first part, and including the depots, engine-houses, shops, and other constructions at the city of Racine aforesaid, and at said town of Beloit, and at all other places along the line of said railroad, and the lots, pieces, or parcels of land on which the same are or may be erected, and all the pieces of land which shall be used for depot or station purposes, with the appurtenances, and all the embankments, bridges, viaducts, culverts, fences, and structery thereon, and all other appurtenances belonging thereto, and all the franchises, privileges and rights of said parties of the first part, of, in, and to or concerning the same, and also all, and singular, their railroad furniture, including engines, tenders, cars of every description,

tools, materials, machinery, and every other kind of personal property, which shall be used for operating said railroad, but nothing herein contained shall be construed to prevent the parties of the first part from selling, hypothecating, or otherwise disposing of any bonds or other securities received in payment of stock, or otherwise, or of any lands or other property of the company not necessary to be retained for the road-way, depot grounds and stations, nor required for the construction or convenient use of their road, nor from collecting moneys due the company on stock subscription or otherwise, provided they shall diligently proceed to collect and faithfully apply all such means to the construction and equipment of their said railroad, and provided also that no default shall have been made in the payment of the interest or principal of any of the above described bonds. To have and to hold the said premises, and every part thereof, with the appurtenances, unto the said parties of the second part, their successors and assigns forever, upon the following terms, that is to say: in case the said parties of the first part shall fail to pay the principle, or any part thereof, or any of the interest on any of said bonds, at any time when the same may become due and payable, according to the tenor thereof, when demanded, then, after sixty days from such default, upon the request of the holder of said bond, the said parties of the second part, their successors or assigns, may enter into and take possession of all or any part of said premises and property, and as the attorneys in fact, or agents of the said parties of the first part by themselves or agents, or substitutes duly constituted, have use, and employ the same, making, from time to time, all needful repairs, alterations and additions thereto, and after deducting the expenses of such use, repairs, alterations and additions, apply the proceeds thereof to the payment of the principal and interest of all said bonds remaining unpaid, and the agent or agents of said railroad actually in possession thereof, are hereby ordered to give such possession to the said trustees, parties of the second part, or their assigns, at their discretion may, or on written request of the holders of at least one half of the bonds then unpaid and unconverted into stock, shall cause the said premises, or so much thereof as shall be necessary to pay and discharge the principle and interest of all such bonds as may be then unpaid and unconverted as aforesaid, to be sold at public auction in the city of Racine, in the State of Wisconsin, or in the city of New York, giving at least forty days' notice of the time, place, and terms of such sale, and of the specific property to be sold, by publishing the same in a newspaper of good circulation in each of said cities, and execute to the purchaser, or purchasers thereof, a good and sufficient deed of conveyance, in fee simple, for the same, which shall be a bar against the parties of the first part, their successors and assigns, and all persons claiming under them of all right, interest or claim, in or to said premises, or any part thereof, and said trustees shall, after deducting from the proceeds of said sale the costs and expenses thereof, and of managing such property, apply so much of the proceeds as may be necessary to the pay-

ment of said principle and interest due or unpaid on said bonds, and return the residue thereof to the said parties of the first part; it being hereby expressly understood, that in no case shall any claim or advantage be taken of any valuation or appraisement or extension laws, by the said parties of the first part; nor any injunctions or stay of proceedings, or any process be applied for, or obtained by them, to prevent such entry or sale aforesaid. And the said parties of the first part hereby further covenant and agree that nothing herein contained shall prevent said parties of the second part, immediately upon the default of the payment of the principal or interest of any such bonds, or any part thereof, from adopting any other legal or equitable remedies, not herein specified, for foreclosing this mort-
184 gage or for collecting the amount which may be due on such bonds.

And the said parties of the first part hereby covenant for the consideration aforesaid, to execute and deliver any further reasonable and necessary conveyance of the said premises, or any part thereof, to the said parties of the second part, their successors and assigns, for more fully carrying into effect the objects hereof, particularly for the conveyance of any property subsequently to the date hereof acquired by the said parties of the first part, and comprehended in the description contained in the premises.

And it is further mutually agreed, and these presents are upon this express condition, that on the payment of the principal and interest of said bonds, or the conversion thereof into stock in the manner aforesaid, the estate hereby granted to the said parties of the second part, shall be void, and the right of the premises and property hereby conveyed, shall revert to, and invest in, the said par-
185 ties of the first part, without any acknowledgement of satisfaction, re-conveyance, entry, or other act.

And it is further mutually agreed, that the said parties of the second part, their successors and assigns, shall only be accountable for reasonable diligence in the management of said trust, and shall not be responsible for the acts of any agents appointed by them, when such agent is selected with reasonable discretion; and that said parties of the second part, their successors and assigns, shall be entitled to receive proper compensation for every labor or service performed by them in the discharge of their trust.

In witness whereof, the said the Racine and Mississippi Railroad Company, the parties hereto of the first part, have caused their corporate seal to be hereunto affixed, and the name of their president to be signed to these presents, and the said "The Farmers' Loan and Trust Company" have also caused their corporate seal to be hereunto affixed, and the name of their president to be signed to these
186 presents, the day and year first above written.

HENRY S. DURAND, [SEAL.]
President Racine and Mississippi Railroad Company.

D. D. WILLIAMSON, [SEAL.]
President Farmers' Loan and Trust Company.

Signed, sealed, and delivered as to D. D. Williamson, president, in presence of—

ROBERT C. BOYD.
GEO. M. FITCH.

As to Henry S. Durand, president, in presence of—

JOHN B. ROWLEY.
HENRY T. FULLER.

UNITED STATES OF AMERICA,
State of New York, City and County of New York, ss:

Be it remembered that on this tenth day of September, in the year one thousand eight hundred and fifty-five, before me, the undersigned, Edwin F. Corey, a commissioner, resident in the city of New York, duly commissioned and qualified by the executive authority, and under the laws of the State of Wisconsin, to take the acknowledgment of deeds, &c., to be used or recorded therein, personally appeared D. D. Williamson, who is personally known to me, and who is known to me to be the president of the Farmers' Loan and Trust Company, who being by me duly sworn, did depose and say, that he resides in the city of New York; that he was president of the
187 Farmers' Loan and Trust Company; that he knew the corporate seal of said company; that the seal affixed to the annexed instrument was such corporate seal; that it was so affixed by authority of the board of directors of said company, and that he signed his name thereto as president of said company by like authority.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year aforesaid.

EDWIN F. COREY, JR., [SEAL.]
Commissioner for the State of Wisconsin,
Office 52 Wall street, New York.

UNITED STATES OF AMERICA,
State of Wisconsin and County of Racine, ss:

Be it rememberd, that on this fourteenth day of September, in the year one thousand eight hundred and fifty-five, before me, the undersigned, Henry T. Fuller, a notary public in and for the county of Racine, and State aforesaid, duly commissioned and qualified by the executive authority and under the laws of said State, person-
188 ally appeared Henry S. Durand, who is personally known to me, and who is known to be the president of the Racine and Mississippi Railroad Company, who being by me duly sworn, did depose and say, that he resides in the city of Racine, in the State of Wisconsin; that he is the president of the Racine and Mississippi Railroad Company; that he knows the corporate seal of said company; that the seal affixed to this instrument is the seal of said company; that it was affixed by order of the board of directors of said company, and that he signed his name as president of said company by the like order.

In witness whereof, I have hereunto set my hand and official seal, the day and year above written.

HENRY T. FULLER, [SEAL.]
Notary Public.

Received for record September 18th, A. D. 1855, at 9 o'clock a. m.

189 Mr. De Wolf offered in evidence a copy of the annual reports for the year 1856, and also the report of 1858.

(Objected, not on account of being copies—that objection having been expressly waived—but on the ground of incompetency, &c.)

Admitted, subject to objection.

(Said report, for the year 1856, is the same pamphlet attached, Dornblaser's deposition, marked Exhibit "B," and is inserted between pages 169 and 171 of this record.)

WM. H. BRADLEY, *Cl'k.*

Fifth annual report of the Racine and Mississippi Railroad Company.—January, 1858.

Board of directors elected January 20, 1858.—Henry S. Durand, Racine, Wisconsin; Isaac Taylor, Racine, Wisconsin; John W. Cary, Racine, Wisconsin; Elisha Raymond, Racine, Wisconsin; William C. Allen, Delevan, Wisconsin; Lucius G. Fisher, Beloit, Wisconsin; William T. Goodhue, Beloit, Wisconsin; Benjamin Dornblazer, Dakota, Illinois; Chancellor Martin, Freeport, Illinois; Emanuel Stover, Cherry Grove, Illinois; John Rinewalt, Mount Carroll, Illinois; William T. Miller, Mount Carroll, Illinois; Daniel P. Holt, Savanna, Illinois.

Officers.—Henry S. Durand, president; William C. Allen, vice president; A. J. Redburn, secretary; William M. Perine, treasurer; John W. Cary, Wm. T. Miller, attorneys; Robert Harris, engineer and sup't; George Moores, master mechanic; J. L. Apgar, road master; E. A. Eddy, superintendent of cars.

Principal office, Racine, Wisconsin; New York office, 44 Exchange Place.

M. K. Jesup, agent, New York.

Directors' report to the stockholders.

GENTLEMEN: Another year in our history having elapsed, and the period arrived when you will expect from us an account of our stewardship, together with a general statement of our progress, position, and prospects, we present you herewith the reports of the secretary and superintendent, showing in detail the receipts and disbursements in both the construction and operating departments, together with full schedules of all of the property of the company and statistics of its operations.

We regret to say that our anticipations cherished one year ago have not been realized, yet while we cannot congratulate you upon

having made the progress expected, we are still confident that our efforts have not been altogether fruitless.

Up to the date of our last report the work of construction had been prosecuted with great vigor and had made rapid progress. This had consequently involved us considerably in debt, besides using up to a great extent our available means and exhausting, in good part, the resources of our friends who had purchased largely of our securities and made us liberal loans of money.

The general stringency of the money market, even at the opening of the year, together with the universal distrust of railroad investments rendered it impossible to open new markets for our securities, or enlist fresh patrons to our enterprise. The year, altogether, ha been unpropitious for obtaining means to carry forward our work, o to liquidate our indebtedness.

We have been compelled to limit our operations, and rigidly econo mise our expenditures, yet the vast importance to all concerned o having the work pressed forward to a paying point, in order to pro vide for our heavy interest account, and place in safety the larg expenditure upon the work already completed, induced the board t incur liabilities which might not have been warranted under othe circumstances. Besides this, in the month of March last, we entere into a negotiation of one million of dollars of our securities, with th fullest assurance of realizing the avails of the same during the suc ceeding six months; but which, with the exception of about fift thousand dollars, failed us altogether. Relying upon this, however our line of operations was enlarged for the time being accordingly and we were not made aware of our disappointment until too late t check a large outlay, which greatly increased our indebtedness This, also, occurring late in the season, with a depressed mone market, together with a complete panic in railway securities of a kinds, rendered new negotiations entirely out the question, an loans to any extent, equally impossible. Early in July it was appar ent that the business and financial affairs of the country wer approaching a crisis, yet, few, probably, anticipated the fearful result which we are now realizing. Long before the final crash, our ow position and circumstances admonished us to retrench our expendi tures, restrict our operations, and use every effort to secure, if pos sible, a safe anchorage during the impending storm. We immediatel suspended our work of grading, car making, and buildings, beside reducing all other disbursements as fast as possible, after securin the unfinished work, and getting the road and equipments in saf condition for the winter.

About the middle of May we reached Durand Station, to which point regular trains have been run without the slightest interruption since that time. During the year the road has, for the most part, been well ballasted, ditched, and fenced, with a substantial board fence on each side. Road and farm crossings have been completed, cattle guards and signal signs erected at public highways, the road-ways and superstructure have been greatly improved and perfected, several of the bridges have been refastened and strengthened, and

all the wooden culverts, deemed in any manner insecure, have been replaced with solid masonry, commodious depots have been erected at Lyons, Darian, and Durand stations, three additional water stations have been completed at convenient points, and two additions have been made to the repair shops, in order to accommodate the valuable machinery recently added to that department. Our shops are now furnished with ample machinery and tools required for all kinds of repair, and but little further outlay in this line will be required for sometime. A number of side tracks have been lengthened and improved; the several stations being now furnished with ample conveniences for doing business promptly and economically. Two first class locomotives, two passenger coaches, two mail and express cars, two baggage cars, eighty house-freight cars, six platform cars, and twelve hand and construction cars have been placed on the road during the year. Eighty-six miles of the main line, with seven miles of side track, are now completed, furnished, and equipped in every particular, which for mechanical execution, convenience, and effective operation, we challenge a comparison with any road in the western country. The entire equipment is in perfect condition; there not being a single defective car or locomotive on the road. We have on hand upwards of twenty miles of rails, nearly forty miles of ties, chairs sufficient for fifty miles, together with a large quantity of lumber and timber for the work of construction. Our shops are supplied with materials for over fifty cars, besides for repairs of cars and locomotives for many months to come. The work of grading, masonry, and bridging has also made great progress, and is in a very forward state. About one hundred thousand dollars will complete the road to Freeport; and the grading from thence to the Mississippi river (thirty-six miles) is more than half completed, and may be finished in four months at an expense of not exceeding one hundred and fifty thousand dollars. The right of way, land damages, and depot grounds, on the whole line, are chiefly adjusted, paid for, and perfect titles obtained.

The stockholders will be prepared to learn that the cost of the work has thus far exceeded the estimates, and that the ways and means relied upon for its completion will be inadequate for such purpose. Justice to the managers requires that the stockholders should properly understand the real facts, in order that they may appreciate the difficulties and embarrassments that have constantly opposed the progress of the work and the effort and toil required to overcome them. With a brief history of these facts before you it will better enable you to judge as to the competency and faithfulness of the management and the policy that should be adopted for the future.

In the first place, to construct a work requiring at least the sum of four millions of dollars, the stockholders, altogether, from first to last, have not furnished us, in actual cash, forty thousand dollars, being scarcely one per cent. of the amount required, leaving the directors to look up the balance as they best could. The item denominated "cash stock" has been worked in by all manner of shifts and

turns conceivable, while the actual cash embraced therein would make but a sorry figure in an undertaking of this magnitude. The balance of the ways and means consisted wholly in "Western securities," entirely unknown in the Eastern or foreign markets, and without any defined value at home or abroad. At no time in our history has there been the slighest demand for our securities, and not a dollar of them has ever been placed except with the most strenuous effort. Our project has been regarded as purely local, hence it has received no aid or comfort from any connecting lines, or the least patronage from any foreign interest.

From the very commencement of the work there has been a steady advance in the value of everything pertaining to its construction. Labor and materials have advanced fully fifty per cent. on an average. Money also has appreciated in the same proportion, while at the same time our ways and means have been declining with equal rapidity.

The practicability of economising in a work of this kind is difficult even with cash in hand, while without cash the thing is impossible. The actual difference between cash down and even an undoubted credit is very great, hence the undertaking to construct a railroad, costing four million of dollars, without cash or credit is a task best understood by those who have attempted its accomplishment.

Another fact bearing upon this point should not be overlooked, viz: we have been compelled to pay interest at a rate averaging probably twelve per cent. per annum upon nearly every dollar expended upon the work from the moment of its application, a long time before any part of the same could be made available.

The obtaining so large a stock subscription from so many different parties, requiring the canvassing of seven or eight counties, the converting the same into bonds and morgages, examining and valuing the property, perfecting and recording the necessary papers, obtaining the proper official certificates, abstracts, and other documents in order to prepare the same for market, involved a vast amount of labor, time, and money, and when all this was done the money itself was as far off as ever, and the difficulty in obtaining it yet to come.

We have retailed our securities in eleven different States, besides several parts of Europe, which has required heavy disbursements in way of salaries, commissions and traveling expenses, besides the terrible discounts to obtain the money. A fearful interest account has been constantly accumulating upon us, to be provided for in good part by the same operation out of our capital stock.

Such, then, is the work, and such the ways and means for its accomplishment, that you have committed to our hands. How well we have performed our task and fulfilled the trust the following exhibits and the work itself must show.

The report of the secretary will show in detail the receipts and disbursements from our organization up to the 1st inst., as appears by the books of the company. A large number of accounts with Eastern agents are unsettled, an adjustment of which will render the exhibit much more satisfactory.

The report of the superintendent will show the extent and value of the property acquired and possessed by the company, while the accompanying documents will exhibit the general performances of the road and equipment, the character of its traffic, together with the expense of operating the same. It should be stated in this connection that as yet the road has had no chance to test the strength and resources of the line, from the fact that it did not reach Beloit in 1856 until too late to participate in the fall business, and on the opening of the following spring it was found that the country was well nigh exhausted of produce. The summer traffic was not only light but chiefly in one direction. Business during the last fall has been perfectly flat, and but small results would have been realized even had the road been opened to Freeport. Therefore, we do not consider the results so far as any test of the business of the road, but small as they are, and attained under the circumstances, may be regarded as good grounds for confidence that with the road completed and the business of the country restored to its ordinary prosperity the expectations of the most sanguine will yet be realized.

While the general revulsion in financial affairs forced us to a suspension of the work of construction, the complete paralyzation of business of every kind has been severely felt in our traffic department. Our disappointment in this respect is most grievous, as we had relied upon our income during the autumn to meet our interest account and sundry disbursements indispensable in our daily transactions. Every effort has been made and every expedient resorted to in order to provide, as far as possible, for the comfort of our employees and the necessities of all parties concerned. Every expenditure has been rigidly retrenched and our expenses cut down to the lowest sum possible, consistent with a due regard for the safety and protection of the large property owned by the company.

The directors have not dwelt upon these facts in a complaining spirit, neither have they forgotten the magnanimity with which the stockholders have from time to time responded to their applications for aid. They admit also that such aid has been furnished in precisely the manner proposed; but our purpose is simply to show the operation of the system which we have adopted and its inevitable results. The great necessity for the road was admitted on all hands, and seemed to justify the boldest efforts and every proper expedient for its construction. Our plan was regarded as both safe and legitimate, while it was the only means in our power for its accomplishment. True, the load had become exceedingly grievous, even before the fatal crash overwhelmed the country at large; and although we can now, perhaps, see more clearly the perils that surrounded us even in our palmiest days, still, whatever may be the results to stockholders or creditors, we are yet unwilling to regard the undertaking as rash or unwarrantable.

The success which had attended most enterprises of this character had inspired an enthusiasm bordering on insanity in all parts of the land; hence it may not be impossible that we too have been a little

over sanguine or somewhat blinded to the possibilities of a miscarriage in our undertaking.

The work has been carried forward in face of many difficulties and some opposition; and it has made already very great progress towards completion. The times have been extravagant and unpropitious, requiring large sacrifices and expenses, together with a heavy and burdensome interest account, yet amid all these things we have had some good luck. By reference to the secretary's report it will be seen that our twenty-year seven per cent. city and town bonds have netted us 82 per cent. The farm mortgages sold have averaged 92½ per cent., and the first mortgage 8 per cent. Bonds running twenty years sold for 80 per cent. All of our contracts and purchases have been favorable, and though our discounts on securities and interest account amount to large sums they are by no means extraordinary.

The plan recently adopted by the board and submitted to the stockholders for raising the means to resume and complete the work has been enthusiastically approved on the part of the stockholders, and it only remains for our creditors to co-operate with us under a plan to be submitted to them in order to enable us to open the line to Freeport by early spring and to complete the whole work at an early day. The vital importance to all concerned of completing the line to Freeport at the earliest possible moment is so apparent as to need no argument. The connection at that point with the Illinois Central railroad at once opens a new and direct line from Lake Michigan at Racine to the Mississippi river at Dunleith, and also a new route from Chicago to the same point by the Chicago, St. Paul, and Fond du Lac railroad and our line.

This would at once expand our field of operations ten-fold, as it would enable us to compete for business at all points between the Atlantic cities and southern Wisconsin, northern Illinois, Iowa, and Minnesota, while it would at the same time greatly increase our local traffic. The completion of this short link of but seventeen miles, requiring but about the sum of one hundred thousand dollars, being of such vast importance to every interest, no effort must be spared to secure its accomplishment. The sum already expended upon the same, together with the materials in hand and the surplus equipments, amount to $580,000, now positively idle, besides which the opening of this link would certainly double the traffic upon the eighty-six miles already in operation.

The kind indulgence and generous confidence of our creditors demands our grateful acknowledgments and entitle them to our best efforts in their behalf.

The plan of operations for completing the work having been so fully laid before the stockholders at the recent meetings held on the line of the road it is unnecessary to recite it here. It is simply for the stockholders to furnish the supplies for men and teams to complete the work and take their pay from the earnings when completed. To accomplish this successfully will require some concessions and the hearty co-operation of all parties concerned.

The Detroit and Grand Haven railroad is making steady and sure

progress. No doubt is entertained by its directors that it will be completed through to Grand Haven, on Lake Michigan, during the coming summer. When that line is opened, our road completed to Freeport, and good steamers placed on the route between Racine and Grand Haven, we are still confident that the results will fully justify the importance and value which we have always attached to this connection.

In view, therefore, of the proximity of the time when steamers will be required for this route, negotiations should be opened at an early day on that subject. While there is no doubt of ample business to support this line, it is not the policy for this company to build or purchase the boats, neither will it be necessary, as competent parties are ready to supply and maintain the same, with suitable arrangements on our part for protecting them against ruinous and unjust competition. Models and estimates are now waiting an examination from us, and this subject will doubtless have such attention as its importance demands.

In conclusion, the board would remark, that notwithstanding the unforeseen contingencies that have arisen in the progress of our enterprise, calculated to enhance its costs, the present burdens that bear so heavily upon us in way of a large floating debt and interest account, together with the appalling state of the times upon which we have fallen, still such is their confidence in the strength and merits of the project, the new elements that have been developed in its favor, the real necessity in which the undertaking originated, the large sum already expended upon the work, the valuable property acquired, the vast interests involved, and the terrible consequences of a failure, demand of us that we know of no such thing as discouragement, or abate one iota of our determination to carry forward the work to a full completion.

By order of the board:

HENRY S. DURAND,
President.

Secretary's report.

SECRETARY'S OFFICE R. AND M. RAILROAD COMPANY,
Racine, Wis., January 26th, 1858.

Henry S. Durand, president:

I have the pleasure now of submitting in form the following statement of the affairs of the Racine and Mississippi Railroad Company, as they appear on the books at the close of December 31st, 1857. The tables were prepared and by you submitted to the board of directors and to the stockholders, at their annual meeting on the 20th inst. A true statement of the affairs of the corporation would show much more favorably. I have reason to believe that there are unsettled subscriptions to the capital stock in the hands of agents to a large amount, which have not been reported to this office, and consequently do not appear on the books. Since the annual meeting of the stockholders, there has been reported subscriptions of this class

upon which are unpaid $162,781 57. This amount, of course, is not embraced in the following report.

Many of the agents of the company having charge of the sale of the securities of the company have not reported. I have no doubt that when settlements with them shall have been effected to the close of the year past, a very considerable amount of the bills payable will appear paid.

Under the present arrangement of terminating the financial year of the corporation with the close of December, we have really less than a week in which to prepare a report for the stockholders on the third Wednesday in January, which is not sufficient, even if the whole of that time could be devoted to that purpose. Permit me to suggest that the financial year close on the 30th November hereafter.

All of which is respectfully submitted.

A. J. REDBURN, *Secretary.*

Statement of the capital stock account of the Racine and Mississippi Railroad Company at the close of December 31st, 1857.

Whole number of shares, 28,728 of $100 each		$2,872,800 00
Amount received on same	$2,705,420 88	
Amount due and unpaid	167,379 12	
	2,872,800 00	2,872,800 00

The amount received on capital stock is—

In farm mortgages	$1,716,850 00	
In bonds, (city and town)	540,000 00	
In cash, (including right of way, lands, labor, materials, and depot grounds,	428,589 39	
In notes, (unsecured)	19,981 49	
And deduct—		
Amount of mortgages on hand unsold, at par		$474,900 00
Amount of Racine city bonds unsold, at par		3,000 00
Amount of town of Beloit bonds unsold, at par		15,000 00
Amount of town of Rockton bonds unsold, at par		43,000 00
Amount of notes unpaid unsold, at par		19,981 49
Amount received nett on stock		2,149,539 39
	2,705,420 88	2,705,420 88

Total disbursements, including assets on hand to December 31st, 1857, in C.

Right of way	$125,712 27
Construction, grading, masonry and bridging, etc	1,075,077 33
Engineering	60,414 47
Building account	69,581 63
Superstructure	52,562 34
Rails	605,876 35
Duties	102,070 04
Chairs and spikes	56,095 52
Ties	99,054 01
Fencing	50,124 80
Water stations	2,014 15
Equipments	178,379 97
Cars	290,823 82
Tools and machinery	20,542 17
Real estate	214,072 63
Personal property	10,443 41
Furnishing account	3,489 22
Furniture for offices and stations	8,498 90
Operating expenses	275,957 80
Taxes	1,327 31
Insurance	13,073 75
Exchange	17,047 92
Recorder's fees	3,217 81
New York office	2,016 02
Officers' and agents' salaries	82,263 23
General salaries	1,050 00
Expense account	66,665 03
Interest on stock	48,079 91
Interest and discount	190,040 51
Interest on 1st mortgage E. D. bonds	62,396 01
Interest on Racine city bonds	50,006 23
Interest on town of Racine bonds	2,800 00
Interest on town of Elkhorn bonds	2,369 48
Interest on town of Delavan bonds	4,375 00
Interest on town of Beloit bonds	700 00
Interest on town of Rockton bonds	297 50
Interest on farm mortgages	100,911 93
Discount on 1st mortgage E. D. bonds	136,481 59
Discount on Racine city bonds	58,191 89
Discount on town of Racine bonds	13,500 00
Discount on town of Elkhorn bonds	5,325 00
Discount on town of Delavan bonds	5,000 00
Discount on town of Rockton bonds	500 00
Discount on farm mortgages	91,916 04
Accounts receivable	132,880 65
Bills receivable	27,449 73
Farm mortgages	474,900 00

Racine city bonds	3,000 00
Town of Beloit bonds	15,000 00
Town of Rockton bonds	43,000 00
Bank of Troy stock	7,760 00
Market Bank of Troy stock	6,680 00
Cash	20,568 43
	4,992,472 87

Gross receipts from all sources to December 31, 1857.

From capital stock	$2,705,420 88
" income	*474,399 60
" loans and discounts	879,425 13
" accounts payable	205,903 35
" 1st mortgage E. D. bonds	680,000 00
" 1st " W. D. bonds	37,000 00
" Several scrip accounts	10,323 91
	4,992,472 87

Including assets on hand.

Superintendent's report.

To the president and directors on the Racine and Mississippi railroad company.

GENTLEMEN: I herewith present statistics of the business of the road for the past year. Since your last annual report the road has been extended to Durand, eighty-six miles from Racine, to which place it was opened for business May 25th.

The earnings of the road during the year have been for—

Passengers	$60,941 91	
Freight, including mails	153,022 07	
		213,963 98
By construction trains		57,644 46
		271,608 44

he expenses for operating have been—

Conductors, baggagemen, and brakemen	8,906 62
Enginemen and firemen	13,930 40
Oil and waste	6,462 21
Fuel	28,339 28
Loss and damage	2,113 54

* Total income to date, except earnings from mail transportation for October, November, and December, 1857.

Postage and telegraphing	95 39
Printing and stationery	2,550 35
Miscellaneous	16,195 31
Repairs of buildings	345 17
" cars	6,749 05
" engines	13,372 51
" tools	517 73
" road	44,610 42
Clearing ice and snow	5,426 80
Station service	39,904 56
Salaries	2,400 00
Total operating expenses	182,919 24

The number of miles run have been for—		
Passengers	86,730	
Freight	88,309	
		176,048
By construction and wood trains		36,579
		212,627
Earnings per mile run for business		1 09

There has been transported over the road during the year—

EASTWARD.

Flour	10,256 barrels.
Wheat	544,040 bushels.
Oats	42,281 "
Corn	22,620 "
Barley	15,111 "
Potatoes	984 "
Mill stuffs	95,852 lbs.
Butter	1,178 "
Pork	356,995 "
Wool	51,056 "
Sundries	14,634,361 "
Equal to	19,256 tons.

WESTWARD.

Merchandise	18,649,644 lbs.
Lumber	18,129,260 feet.
Shingles	7,484 M.
Posts, etc	673 cords.
Lime	3,323 barrels.
Iron	676,020 lbs.
Coal	3,495,653 "
Salt	1,248 "
Miscellaneous	32,140 "
Equal to	49,074 tons.

In addition to this there has been transported material for the road, iron, ties, fencing, wood, etc., 9,206 tons, making an aggregate of 77,536 tons.

It will appear from the statistics that the tonnage westward has been nearly three times as much as that eastward, while in a season of ordinary prosperity it would be about the same, and the necessary expense of doing the extra business would be but little, if any.

The whole number of paying passengers carried on the road during the year is		98,404
Carried west	51,760	
Carried east	46,644	

While I have the pleasure to state that not the slightest injury has happened to any passenger, I regret to say that one of our employees was accidentally killed at the Shirland station, in July last.

The total length of main track laid is eighty-six miles, with seven miles of side track. The equipment consists of 17 first class locomotives; 8 first class passengers cars; 2 mail cars; 6 baggage cars; 230 house-freight cars, (128 made by company;) 57 platform cars, (45 made by company;) 32 hand and dirt cars; 3 iron cars; 1 snow plow.

There is on hand material applicable to the extension of the road—

Material for cars, including wheels and axles	$25,000
Ties	30,000
Chairs	8,000
Iron	116,000
Fencing	3,700
Timber	1,600
Powder	2,200
Tools, castings, etc	1,500
Total	188,000

By an examination of the line from Durand to Freeport, since my appointment as engineer of the road, I find that there will be needed to complete the grading, bridging and masonry at Freeport, laying track, and the necessary buildings at Davistown, Dakota and Freeport, about $125,000.

For finishing the road bed ready for the track between Freeport and—

Savanna, there is estimated to be required about	$150,000
For iron	200,000
Additional ties, chairs, spikes and laying track	50,000
Right of way	10,000
Fencing	25,000
Buildings	25,000
	460,000

There is needed a new station house at Rockton, and with this exception, there will be required no expense for construction on that part of the road now in operation, until the increased business of the road when completed to Freeport, shall require more docking and extension of tracks at Racine to accommodate it, and the finishing of the graveling.

Respectfully submitted,

ROBERT HARRIS,
Chief Engineer and Sup't.

APPENDIX.

Interest account.

Interest on stock	$48,079 91
" loans and discounts	190,040 51
" first mortgage 8-per cent. E. D. bonds	62,396 01
" city of Racine bonds	50,006 23
" town of Racine "	2,800 00
" " Elkhorn "	2,369 48
" " Delavan "	4,375 00
" " Beloit "	700 00
" " Rockton "	297 50
" Farm mortgages	100,911 93
Total	$461,976 57

Discount on securities.

On first mortgage 8 per cent. E. D. bonds	$136,481 59
" Racine city bonds	58,191 89
" Racine town "	13,500 00
" Elkhorn " "	5,325 00
" Delavan " "	5,000 00
" Rockton " "	500 00
" Beloit " "	5,000 00
" Farm mortgages	91,916 04
" Exchange	17,047 92
Total	$332,962 44

Statement of sales of securities.

		Am't sold.	Am't of dis.	Net proceeds.	Rate of dis.	Rate net.
8-per cent	1st mortgage bonds	$680,000	136,481 59	543,518 41	20 per cent.	80 per cent.
10 "	farm mortgages	1,241,950	91,916 00	1,150,034 00	7¼ "	92¼ "
7 "	town and city bonds	469,000	87,516 89	381,483 11	18 "	82 "

Statement of Gross and net cost of work.

Gross receipts from all sources	$4,992,372 87		
Less on loans and discounts paid	181,000 00		
	$4,811,472 87		
Deduct assets on hand	813,279 12		
	$3,997,193 75		
Discount on securities, interest account, expenses, salaries, etc.	947,085 00	about 24 per cent.	
Net receipts	**$3,050,108 75**		
Net cost of 86 miles completed.	$2,164,931 00	or $25,000 pr. mile.	
Add 24 per cent.	2,684,514 00	or 31,000 "	
Net balance over net cost of 86 miles			$885,177 75
Surplus equipment	$200,000 00		
Materials on hand	188,000 00		
Grading, east of Freeport	260,000 00		
" west of "	110,000 00		
Right of way, engineering, etc	60,000 00		
Proportion of Racine city prop'y, tools, machinery, etc., adapted to the whole road	60,000 00		
Expended on balance of road	$78,000 00		
Add 24 per cent	210,720 00		$1,088,720 00

Assets.

Farm mortgages		$474,900 00
Bills receivable		27,449 73
Racine city bonds		3,000 00
Town of Beloit bonds		15,000 00
" Rockton "		43,000 00
" Racine "		10,000 00
Lands		100,000 00
Balance due on stock		139,929 39
Subscriptions returned since annual meeting		162,781 00
" not yet returned to office, estimated		100,000 00
First mortgage 8-per cent., west division, bonds		700,000 00
		$1,776,060 12
Bills payable, open	$879,485 00	
Less canceled and collaterals included	181,418 00	
	$698,067 00	

Accounts payable, open....	$205,903 00		
Less to be canceled by adjustment....	66,240 00		
	$139,663 00		
Less accounts receivable after deducting amount settled.....	$111,215 00	$28,448 00	$726,515 00

Statement of miles run and oil and waste used by engines during the year 1857, and repairs.

No.	Name of engine.	How connected.	Manufactured.	Cylinder.		Drivers.		Weight in tons.	Gals. Oil	lbs. waste.
				Diam.	Stroke.	No. pin.	Diam.			
1	No. one	Outside	R. L. & M. W	12 in.	18 in.	2	4½ ft.	16		
2	Racine	"	" "	14 "	20 "	2	5 "	22	161¼	179½
3	Elkhorn	"	" "	15 "	22 "	2	5 "	24	171⅜	227½
4	Delavan	"	" "	14 "	20 "	2	5 "	22	205½	223
5	C. S. Wright	"	" "	16 "	22 "	2	5 "	26	217¼	263
6	Freeport	"	" "	16 "	22 "	2	5 "	26	120	155½
7	Savanna	"	" "	16 "	22 "	2	5 "	26	164¾	169¾
8	Wm. C. Allen	"	" "	16 "	22 "	2	5 "	26	150¾	215½
9	Belle City	"	" "	16 "	22 "	2	5 "	26	231¾	291
10	M. K. Jessup	"	" "	16 "	22 "	2	5 "	26	154¾	193
11	Southern Wisconsin	"	" "	16 "	22 "	2	5 "	26	81	102
12	Badger	"	" "	12 "	22 "	2	37-12	14	76¾	136
13	H. S. Durand	"	Manchester works	15 "	22 "	2	5½ "	24	73½	81
14	Burlington	"	Breese, Kneeland & Co	15 "	22 "	2	5 "	22	109	199½
15	Beloit	"	" "	15 "	22 "	2	5 "	22	112¾	185½
16	Mount Carroll	"	Swinburne	15 "	22 "	2	5 "	24	122½	122
17	Prairie Flower	"	"	15 "	22 "	2	5 "	24	133	133½
18	Rockton	"	Niles & Co	15 "	22 "	2	5 "	22	196½	233½

The above is a true statement of the performance of the engines under my charge for the year ending 1857.

GEORGE MOORES, *Master Mechanic.*

Statement of miles run, &c.—Continued.

No.	Name of engine.	How connected.	Manufactured.	Miles run.			Total.	When put on track.	Repairs.
				Pass.	Fr'ght.	Wood and gravel.			
1	No. one	Outside	R. L. & M. W						
2	Racine	"	" "	16,686			16,686	1855.	$943 05
3	Elkhorn	"	" "	15,285			16,285	"	1,306 52
4	Delavan	"	" "	21,044		75	21,119	"	369 35
5	C. S. Wright	"	" "		17,008		17,008	August 1, 1856	478 49
6	Freeport	"	" "	171	5,456	5,638	11,265	May "	187 30
7	Savanna	"	" "	288	13,152		13,439	October "	105 72
8	Wm. C. Allen	"	" "	1,536	11,503	273	13,312	August "	338 73
9	Belle City	"	" "	7,379	11,391	361	19,131	Nov. "	222 81
10	M. K. Jessup	"	" "	5,166	8,474	496	14,136	June "	194 84
11	Southern Wisconsin	"	" "	172	6,400		6,572	June 1857	132 69
12	Badger	"	" "		6,923		6,923	August "	75 74
13	H. S. Durand	"	Manchester works	6,164		550	6,714	Sept. 1856	628 13
14	Burlington	"	Breese, Kneeland & Co	201		8,893	9,094	1855.	1,028 01
15	Beloit	"	" "			9,347	9,347	"	1,007 14
16	Mount Carroll	"	Swinburne		6,597	2,284	8,881	July 1856	214 87
17	Prairie Flower	"	"		2,324	4,627	6,951	May "	294 03
18	Rockton	"	Niles & Co	12,647	82	5,035	1,764	April "	500 44

The above is a true statement of the performance of the engines under my charge for the year ending 1857.

GEORGE MOORES, *Master Mechanic.*

190 Mr. De Wolf, here offered in evidence the articles of consolidation of the Racine and Mississippi R. R. Co., with the Rockton and Freport Co., on the 23d February, 1854, and the consolidation of the same with the Savanna Branch Company, on the 23d January, 1856.

(Objected to as above, on ground of incompetency. Admitted subject to objection.)

Articles of Consolidation.

Articles of agreement, made and concluded this 23d day of January, 1856, by and between the Savanna Branch Railroad Company, a corporation existing under an act of the legislature of the State of Illinois, of the first part, and the Racine and Mississippi Railroad Company, a corporation existing under an act of the legislature of the State of Wisconsin, of the second part:—Witnesseth as follows:

1st. The said party of the first part, in consideration of the agreements and stipulations hereinafter mentioned, and of the sum of one dollar to them in hand paid, by the said party of the second part, the receipt whereof is hereby acknowledged, have bargained, sold, granted, and conveyed, and by these presents do bargain, sell, grant and convey unto the said party of the second part, and to their successors and assigns, the right to construct, use and operate all of the railroad authorized to be constructed by them, by virtue of their acts of incorporation, and when said railroad shall have been so constructed, to use, operate, own, and control the same forever; hereby granting and assigning to the said party of the second part, all the powers, privileges, and franchises conferred by said act of incorporation.

2nd. The said party of the first part, in consideration aforesaid, hereby also bargain, sell, assign, and set over to the party of the second part, all of the subscriptions to the capital stock now held by them, paid or unpaid, due or to become due, and hereby authorize the said party of the second part, to receive and collect the same, in accordance with the terms of such subscriptions, and to use the same for the purpose of constructing said line of road.

3rd. The said party of the first part, in consideration aforesaid, hereby merge and consolidate the capital stock owned and held by them, with the capital stock of the said party of the second part, together with all of the powers, privileges, benefits, advantages, and franchises now held by them by virtue of their act of incorporation.

4th. And the said party of the first part, in consideration aforesaid, also hereby bargain, sell, assign and set over unto the said party of the second part, all of the property and effects held and owned by them, as a part of their said capital stock, whether real or personal, including the books, papers, maps, plans, profiles, and other things appertaining to the organization, surveys and business of the said Savanna Branch Railroad Company.

5th. The said party of the second part, in consideration of the premises, do hereby agree to receive from the said party of the first part, the said subscriptions to their capital stock, together with the

property and effects above named, and consolidate the same with their own capital stock, making the same a part and parcel thereof, at its cost value, and place the subscribers to the same, and all monies paid upon the same, upon an equal footing in all respects with the subscribers to their own capital stock.

6th. The said party of the second part, do hereby further agree that all of the subscriptions already made to the capital stock of the said Savanna Branch Railroad Company, together with all subscriptions that may hereafter be made to the capital stock of the Racine and Mississippi Railroad Company, by parties residing on the line of said Savanna Branch railroad, shall be used and applied in the construction of that portion of the work.

7th. The said party of the second part further agrees to locate, construct, equip, and put in operation the railroads hereby consolidated, from the city of Racine, Wisconsin, by way of the city of Freeport and the village of Mount Carroll, to the village of Savanna, in the State of Illinois, at the earliest practicable period, and as fast as their means and resources will allow it to be done.

8th. And it is further mutually agreed that the name of the consolidated companies shall be the "Racine and Mississippi Railroad Company," and the whole management of its affairs shall be under the management and control of the now directors of the Racine and Mississippi Railroad Company, until another board of directors shall be chosen by said consolidated companies; provided, however, that the persons who now are the directors of the Savanna Branch Railroad Company, be, and they are hereby appointed a committee with full powers to obtain subscriptions, right of way, and depot grounds, on the proposed line of said Savanna Branch road, and such committee, or a majority of them, shall have sole control over all the means raised by individual subscriptions, farm mortgages, county bonds, or otherwise, for the construction of said road, along the line of said Savanna Branch road, until another board of directors shall be elected in said consolidated company, so far as to see that the same are applied as above agreed. And it is further agreed that this contract shall take effect when it has been approved by the board of directors of each company, and when a majority in interest of the stockholders of said Savanna Branch shall have approved of the same in writing.

In testimony whereof, the said parties have caused these presents to be signed by their presidents respectively, and the corporate seal of each company to be hereunto attached the day and year first above written.

[SEAL.] H. S. DURAND,
President, S. B. R. R.

[SEAL.] JOHN DISCON,
Vice Pres't R. & M. R. R.

Articles of Agreement:

Made and concluded this 23d day of February, 1854, by and between the Rockton and Freeport Railroad Company, a corporation existing under an act of the legislature of the State of Illinois, of the first part, and the Racine, Janesville and Mississippi Railroad Company, a corporation existing under an act of the legislature of the State of Wisconsin, of the second part, witness as follows:

1st. The said party of the first part in consideration of the agreement and stipulations hereinafter mentioned, and of the sum of one dollar to them in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have bargained, sold, granted and conveyed, and by these presents do bargain, sell, grant and convey unto the said parties of the second part, their successors and assigns, the right to construct and use all of the railroad authorized to be constructed by them by virtue of their act of incorporation, hereby granting and assigning to said parties of the second part all the powers, privileges and franchises conferred by said act.

2d. The said party of the first part in consideration aforesaid, hereby also bargain, sell, assign and set over all of the subscriptions to the capital stock now held by them, paid or unpaid, due or to become due, and hereby authorize the said parties of the second part to receive and collect the same in accordance with the terms of such subscriptions, and to use the same for the purposes of constructing said line of road.

3d. The said parties of the first part in consideration aforesaid, hereby merge and consolidate the capital stock owned and held by them with the capital stock of the said parties of the second part, and hereby place the management and control of the same, together with all the powers, privileges, benefits, advantages, and franchises now held by them by virtue of their act of incorporation, under the board of directors of the said Racine, Janesville and Mississippi Railroad Company, pursuant to section ten of said act.

4th. The said parties of the second part in consideration of the premises, do hereby agree to receive the subscriptions to the capital stock of the said Rockton and Freeport Railroad Company, and consolidate the same with their own capital and make the same a part and parcel thereof, and place the subscribers to the same upon an equal footing in all respects with the subscribers to their own capital stock.

5th. The said parties of the second part agree to release and exonerate the present subscribers to the capital stock of the Rockton and Freeport railroad companies from all or any portion of their said subscriptions, provided they shall desire the same, excepting the subscription of the town of Rockton.

6th. The said party of the second part agree that all subscriptions now made to the capital stock of the said Rockton and Freeport Railroad Company, together with all subscriptions that may hereafter be made to the consolidated stock by parties residing in the State of

Illinois, shall be used and expended in constructing that portion of the work within the State of Illinois.

7th. The said parties of the second part agree to construct, equip, and put in operation the railroad hereby consolidated, from the city of Racine, in the State of Wisconsin, by way of the village of Beloit and the village of Rockton, to Freeport, in the State of Illinois, at the earliest practical period, and as fast as their means and resources will allow it to be done.

8th. The parties hereto agree and declare that the meaning and intention of this agreement is to fully merge and consolidate the capital stock, powers, privileges, immunities, and franchises of the Rockton and Freeport Railroad Company with the Racine, Janesville and Mississippi Railroad Company, hereby waiving any omissions or informalities contravening or prejudicing the intentions of the parties hereto.

In witness whereof, the board of directors of said companies have directed these presents to be executed by their presidents, and sealed with their corporate seals, the day and year first above written.

The Rockton and Freeport Railroad Company, by
JOHN B. PETERSON,
Pres't Pro. Tem.

The Racine, Janesville, and Mississippi Railroad Company by
HENRY S. DURAND,
President.

Attest:
W. R. WELD, *Sec'y Rockton and Freeport R. R. Co.*

191 Mr. DeWolf offered in evidence the charter of the Racine and Mississippi Railroad Company, published 1855.

(Objected on ground of incompetency, but not on account of its being a copy, the objection on that ground it having been waived.)

Admitted subject to objection.

An act to incorporate the Racine, Janesville and Mississippi Railroad Co.

The people of the State of Wisconsin, represented in Senate and Assembly, do enact as follows:

SEC. 1. Charles S. Wright, Marshall M. Strong, Samuel G. Bugh, James Catton, Peter Campbell, Henry S. Durand, James H. Earnest, John Dickson, Daniel Lawson, William J. Allen, S. S. Barlow, James Neil, and Wm. A. Lawrence, shall be, and they are hereby, appointed commissioners, under the direction of a majority of whom, subscriptions may be received to the capital stock of the Racine, Janesville and Mississippi Railroad Company, hereby incorporated, and they may cause books to be opened at such times and places as they may direct, for the purpose of receiving subscriptions to the capital stock of said company, first giving thirty days' notice of the times and places by publishing the same in one newspaper printed at Madison, and one in the village of Janesville, and one in the city of Racine.

SEC. 2. The capital stock of said company shall be three million dollars, in shares of one hundred dollars each, and as soon as three hundred shares of stock shall be subscribed, and five dollars on each share actually paid in, the subscribers of such stock, with such other persons as shall associate with them for that purpose, their successors and assigns, shall be, and they are hereby, declared and created a body corporate and politic, by the name and style of the "Racine, Janesville, and Mississippi Railroad Company," with perpetual succession, and by that name shall have all the privileges, franchises, and immunities incident to a corporation; they shall be capable in law of purchasing, holding, selling, leasing, and conveying estate, real, personal, or mixed, so far as the same may be necessary for the purposes hereinafter mentioned; and in their corporate name may sue and be sued, plead and be impleaded, may have a common seal. and may alter the same at pleasure, and generally may do all and singular the matters and things which to them it shall lawfully appertain to do for the well being of said corporation.

SEC. 3. The said commissioners, or a majority of them, after said three hundred shares of stock shall have been subscribed as aforesaid, shall give at least thirty days' notice in the newspapers hereinbefore mentioned, of the time and place by them appointed for the subscribers or stockholders to meet for the purpose of electing thirteen directors, and annually thereafter the said stockholders shall meet on the third Wednesday of January for the purpose of electing directors as aforesaid, upon a like previous notice to be given as aforesaid: *Provided*, That previous to the first election, the commissioners hereinbefore named shall elect one of their number president, and they shall perform all the duties and be invested with all the powers of directors: *And provided*, That if from any cause an election shall not be held at the regular time specified therefor, the same may be held at any other time, on notice as aforesaid; that until such election, the directors of the preceding year shall continue to act, and that this charter shall not be avoided by reason of the irregularity or want of such election: *And provided also*, That in case of vacancy from death, removal, or resignation of any director, his place may be filled by a majority of the board of directors.

SEC. 4. The affairs of said corporation shall be managed by a board of thirteen directors, who shall be chosen annually by ballot, on the days hereinbefore prescribed, by the stockholders of said company, the votes to be delivered in person or by proxy duly authorized, which directors shall appoint one of their number to be president, and shall respectively serve for one year, or until other directors are elected; they shall have the power to make and establish such by-laws, rules, and regulations, not inconsistent with the constitution and laws of this State, as may be necessary for the well-ordering the affairs of said company.

SEC. 5. None but stockholders shall be elected directors, and at every election, and in all cases where stockholders shall be called upon to vote, each share of stock shall be entitled to one vote, and in all cases of elections of directors, the thirteen stockholders having the highest number of votes shall be declared elected.

SEC. 6. The said directors shall meet at such times and places, and be convened in such manner as they may hereafter decide upon. A majority of said directors shall be a quorum for the transaction of business, who in the absence of the president shall appoint a president pro tem. The said directors shall appoint a secretary, treasurer, and such engineers and other officers as they may find necessary; and they shall have full power to fix the compensation of all officers or agents, and may demand adequate security for the performance of their respective trusts; they shall decide the time and manner and proportions in which the said stockholders shall pay the money due on their respective shares, and forfeit to the use of the company the share or shares of every person or persons failing to pay any installment so required, at a reasonable period, not less than sixty days after the time by them appointed for the payment thereof; they shall have full power to regulate tolls, to make such covenants, contracts, and agreements with any person, co-partnership, or body politic whatsoever, as the construction and management of the works and the convenience and interest of the company may require, and in general superintend and direct all the operations, receipts, disbursements, and other proceedings of the company: *Provided*, That no installment called in at any one time shall exceed twelve dollars per share, and that no installment shall be called for by the directors without at least thirty days' notice thereof in the newspapers hereinbefore named.

SEC. 7. The directors chosen as aforesaid, shall issue a certificate to each stockholder for the number of shares he or she may subscribe for or hold in said corporation, signed by the president and countersigned by the secretary, and sealed with the common seal, subject, however, to all payments due or to become thereon, which stock shall be transferable in person or by attorney, executors, administrators, guardians, or trustees, under such regulations as may be provided for in the by-laws of said company.

SEC. 8. At each annual meeting of the stockholders for the purpose of electing directors, the directors of the preceding year shall exhibit to hem a complete statement of the affairs and doings of the company for such year; and special meetings of the stockholders may be called by order of the directors, or by stockholders holding one-fourth of the capital stock on like notice as that required for annual meetings, specifying moreover the object of such meeting; but no business shall be transacted at such special meeting, unless a majority in value of the stockholders shall attend in person or by proxy.

SEC. 9. The said company shall have power to locate and construct a single or double track railroad from the city of Racine, in the county of Racine, via the village of Janesville, through the counties of Rock, Green, Lafayette, and Grant, to the Mississippi river; and shall have power to transport, take and carry property and persons upon the same by power and force of steam, of animals, or of any mechanical or other power, or by any combination of them; and they shall also have power to make, conduct, and erect all such side tracks, turn-outs, and connecting tracks, and also such warehouses, toll-

houses, machine shops, carriages, cars, and other works and appendages, as may be necessary for the convenience of the company for the use of the said railroad, and also to connect said railroad, and operate the same with other railroads and branch railroads in the State of Wisconsin, and consolidate the capital stock of said company with the capital stock of any railroad company with which the roads of said company shall intersect, and shall have full power to place the road of this company and its capital stock so consolidated, under the direction of a joint board of directors to be chosen upon such terms as the directors of the companies consolidating their capital stock shall agree upon.

SEC. 10. If said corporation shall not, within five years from the passage of this act, commence the construction of said railroad, and shall not within ten years complete the same, then the rights, privileges, and powers of said corporation under this act shall be void.

SEC. 11. It shall be lawful for said company, their officers, engineers, and agents, to enter upon any land for the purpose of exploring, surveying, and locating the route of said road, doing thereto no unnecessary damage; and when the said route shall be determined by said company, it shall be lawful for them, their agents, officers, engineers, contractors, and servants, at any time to enter upon, take possession of, and use such lands, not exceeding one hundred and thirty feet in width, along the line of said route, subject, however, to the payment of such compensation as the company may have agreed to pay therefor, or such as shall be ascertained in the manner hereinafter directed and provided in such cases respectively; and said company are further authorized by their officers, engineers, agents, and servants, to enter upon lands adjacent to the railroad beyond the limits of one hundred and thirty feet, in the manner provided in this act, when necessary for the purpose of erecting depot building, station-houses, and necessary fixtures for the operation and business of said road, and for the purpose of making drains and giving a proper direction to water courses across or along said road, when the same are necessary beyond the limits of said road, and to remove all substances and things which might endanger, obstruct or interfere with the free use of said road, and to deposit earth, gravel, and stone taken from cuts, and to obtain earth, gravel, stone and other materials for embankments and structures necessary to the construction and repairs of said road, doing, however, no unnecessary damage, and all lands so acquired, and all damages which shall be done to any lands or property under the provisions of this section, shall be ascertained and paid for in the manner and agreeable to the provision hereinafter provided; and when such damage shall have been paid for, or tendered, the title of the land occupied by such fixtures, excavations and embankments, shall vest in fee simple in said company.

SEC. 12. When the said corporation cannot agree with the owner or owners of such required land, for the purchase thereof, or as to the compensation to be paid therefor, or when by reason of the legal incapacity, or absence of any such owner or owners, no such agree-

ment or purchase can be made, then, and in that case, it shall be lawful for any judge of the supreme court of this State, on application of the said company, and at the cost and charge of said company, to appoint three disinterested persons residing in the counties through which the said road runs, whose duty it shall be to view and examine the lands so taken, with the buildings and improvements, if any thereon, and to estimate the value of the land so taken or required by the said company, and all damages which the owner or owners thereof shall sustain, or may have sustained, by reason of the taking of the same for the construction and use of said road or works appertaining thereto, taking into consideration the advantages as well as the disadvantages of the same by means of the construction and operation of said road to the said owner or owners; and it shall be the duty of the said company to give three weeks' notice of their application to the judge of the supreme court for the appointment of the said commissioners, to be published for three successive weeks in a newspaper published at the capital of the State, and also in a newspaper, if there shall be any published, in each of the counties through which said road may be located, and the affidavit of the publisher or printer shall be legal evidence of such publication; and the persons so appointed, before entering upon the discharge of such duties, shall take an oath before some justice of the peace, or other person competent to administer oaths, faithfully and according to the best of their abilities, to examine the land so taken or required by said company, and impartially to estimate and appraise the value of the same, and the damage or injury which the owner or owners thereof shall have sustained, or may sustain, by reason of the taking and using thereof by the said company, over and above the benefits and advantages which such owner or owners shall derive from the construction of such railroad; whereupon, such commissioners shall proceed to examine the premises and estimate the value of such land, and the amount of damage, if any, over and above the benefits and advantages which may accrue to such owner or owners as aforesaid, and shall make a report in writing of such valuation, under their hands and seals, to the circuit court of the county where the land lies, and shall return the same within thirty days after their appointment, to the clerk of the circuit court of the county in which they reside, and it shall be the duty of the said clerk to file the same; and in case no appeal shall be made within thirty days after the filing of said reports as hereinafter provided, then the said clerk shall record the same at the expense of the said company, and judgment of the said court shall be entered thereon, on motion of either party, at any term of said court: *Provided*, That either party may appeal to said court within thirty days after said report shall have been filed in the clerk's office, and such appeal shall be tried in the same manner as other issues are tried in said court, and the jury empannelled to try the same shall find the value of the land so taken or required by said company, and the damages which the owner or owners thereof shall have sustained or may sustain by the taking of the same, over and above the benefits which will accrue to such owner or owners from

the construction of such railroad, and judgment of court shall be entered accordingly: *Provided also*, That it shall not be lawful for the said commissioners or said court to proceed in the assessment of damages, or in the valuation of any lands or materials as aforesaid, in the absence of the owner or owners thereof, his, her, or their agents or attorneys, unless it can be shown to them by competent testimony that the said owner or owners have had at least five days' notice of the time and place at which such assessment or valuation was to be made, or that the said owner or owners are absent from the State of Wisconsin; and if the said owner or owners shall be minors, or non compos mentis, or absent from the State, the service of notice may be made on the guardian or trustee, if there be any, or in such manner as the court may direct: *Provided also*, That upon the making and filing of any report as aforesaid, and payment or legal tender of the amount of any valuation or appraisal specified therein to the owner or owners of any such lands, his, her, or their legal representatives, the said company, their agents, or the contractor for making or repairing said railroad, may immediately take and use the same without awaiting the issue of any appeal brought thereon.

SEC. 13. Whenever any judgment shall have been entered as hereinbefore provided, for the value of any lands, or for any damages for the taking and using of the same, and the amount specified in such judgment shall have been paid or tendered to the owner or owners of such lands, his, her, or their legal representatives, the said company shall be entitled to the easement of the same so long as it shall be used as the track of said railroad; and if such valuation be not received when tendered, it may at any time thereafter be received, or may be collected of said company by action at law at the cost and expense of the person or persons entitled to the same: *Provided*, That the cost of any proceedings and judgments specified in the last preceding section shall be taxed by the court and paid by said company, except in cases where upon appeal the verdict of the jury shall be for the same or a less sum than that reported by the said commissioners.

SEC. 14. The said railroad shall be so constructed as not to impede or obstruct the free use and passage of any public road or roads which may cross the same, and in all places where such railroad may cross, or in any way interfere with any public road, it shall be the duty of said company to make or cause to be made a sufficient causeway or passageway to enable all persons traveling such public road to pass over or under such railroad without inconvenience: *Provided*, That in cases where said railroad may cross or come in contact with any public or private road so as to occupy any part of such road, it shall be lawful for said company to construct said railroad across or upon such road, after altering and putting the same in as good condition as before, and for that purpose the said company shall, previous to occupying any part of such road, construct a new road, in part or in whole, as may be necessary, on ground adjacent to such road, and in every respect complete such newly-constructed road or part of a road so interfered with, as substantially as it was previous to the disturbance and occupancy thereof by said company.

SEC. 15. For the convenience of persons owning or possessing lands through which said railroad shall pass, it shall be the duty of said company when required to make a good and sufficient passage over or under said railroad, whenever the same may be necessary to enable the occupants of said lands to pass over or under the same with wagons, carts, and implements of husbandry, as occasion may require: *Provided*, That said company shall in no case be required to make more than one such passage way for each farm; and when any public road shall cross said railroad in any farm, the person owning or possessing said farm shall not be entitled to require said company to make any additional causeway.

SEC. 16. This act shall be construed favorably to effect the purpose hereby intended, and the same is hereby declared to be a public act, and copies thereof, printed by authority of the State of Wisconsin, shall be received as evidence thereof.

SEC. 17. Any person who shall wilfully and maliciously place any obstruction or thing upon the track of said road, or shall remove or damage any part thereof, in such a manner that the engine or cars may be impeded or thrown off the track, shall be guilty of a misdemeanor, whether such result shall happen or not, and shall be punished for every such offence by imprisonment in the State prison, for a term of not less than one nor more than five years, at the discretion of the court, and in case any damage shall result from placing such obstructions, or injury to said road, said party shall be liable to pay all such damage to said company, and to any other person damaged or injured thereby, and in case any accident shall happen in consequence of placing such obstructions, or in consequence of breaking or injuring said road, whereby death may be produced, the party so offending shall be adjudged guilty of murder in the first degree, and shall be punished agreeably to the law in such casesmade and provided.

SEC. 18. The said railroad company are hereby authorized and fully empowered in their corporate name and capacity to borrow any sum or sums of money from any persons, corporations, or body politic of any kind, and for any rate of interest which may be agreed upon by and between said company, and any person or party of whom such money may be obtained, and make and execute in their corporate name all necessary writings, notes, drafts, bonds, or other papers, and make, execute, and deliver such securities in amount and kind as may be deemed expedient by said corporation, any law on the subject of usury in this State or any other State where such transactions may be made to the contrary notwithstanding; and the powers of said corporation, for the purposes aforesaid, and for all purposes necessary to carrying out the objects of said company, namely: the construction of a railroad from Racine, in the county of Racine, by way of the village of Janesville, in the county of Rock, through the counties of Rock, Green, Lafayette, and Grant, to the Mississippi river, and the contracts and official acts of said company, are hereby declared binding, in law and equity, upon said corporation, and all other parties to said contracts.

SEC. 19. This act shall be in force from and after its passage; and it shall be lawful for said company to purchase lands adjoining or adjacent to said railroad, for the purpose of procuring earth, gravel, stone, or other materials for the construction and repair of said road or buildings and fixtures connected therewith, and whenever such lands shall no longer be needed for the purposes aforesaid, the said company are hereby authorized to sell and convey the same.

SEC. 20. In case there shall be incumbrances upon the land taken as hereinbefore provided, it shall be sufficient for the said company to deposit the amount of damages assessed as hereinbefore provided, with the clerk of the circuit court of the county where the land lies, to be paid over by the said clerk to the owner of said land or his lawfully authorized agent, upon the removal of the said incumbrances.

J. McM. SHAFTER,
Speaker of the Assembly.
E. B. DEAN, JR.,
President pro tem. of the Senate.

Approved April 17, 1852.

LEONARD J. FARWELL.

Published July 6, 1862.

An act to authorize the Racine, Janesville, and Mississippi Railroad Company to build their road in divisions.

The people of the State of Wisconsin represented in the senate and assembly, do enact as follows:

SECTION 1. The Racine, Janesville, and Mississippi Railroad Company are hereby authorized to construct their road in divisions, and to make the stock of the several divisions separate and independent stocks.

SEC. 2. This act shall take effect from and after its passage.

HENRY L. PALMER,
Speaker of the Assembly.
DUNCAN C. REED.

Approved March 19th, 1853.

LEONARD J. FARWELL.

STATE OF WISCONSIN, *Secretary's Office, ss:*

I, Charles D. Robinson, secretary of state of said State, do hereby certify that I have compared the foregoing with the original enrolled act deposited in this office, and that it is a correct transcript therefrom and of the whole of said original.

In witness whereof, I have hereunto set my hand and affixed the great seal of said State, at the capitol in Madison, this 4th day of May, A. D. 1853.

CHARLES D. ROBINSON,
Secretary of State.
By CHAS. G. MAYERS, *Dep'y.*

An act to amend section nine of chapter three hundred and ninety-two of the session laws of 1852.

The people of the State of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. Section nine of chapter three hundred and ninety-two of the session laws of eighteen hundred and fifty-two is hereby amended so as read as follows:

"The said company shall have power to locate and construct a single or double track railroad from the city of Racine through the counties of Racine, Walworth, Rock, Green, Lafayette, and Grant, via the city of Janesville, to the Mississippi river, and also to build a branch railroad from the main line of said road, at any point west of Fox river, to Beloit, and shall have power to transport, take, and carry property and persons upon the same, by power and force of steam, of animals, or of any mechanical or other power, or by any combination of them, and they shall also have power to make, construct, and erect all such side tracks, turnouts, and connecting tracks, and also such warehouses, toll-houses, machine shops, carriages, cars, and other works and appendages as may be necessary for the convenience of the company for the use of said railroad, and also to connect said railroad and operate the same with other railroads and branch railroads in the State of Wisconsin, and consolidate the capital stock of the said company with the capital stock of any railroad company with which the road of the said companies shall intersect, and shall have full power to place the road of their company and its capital stock so consolidated under the direction of a joint board of directors, to be chosen on such terms as the directors of the companies consolidating their capital stock shall agree upon."

SEC. 2. This act shall take effect from and after its passage.

H. L. PALMER,
Speaker of the Assembly.
TIMOTHY BURNS,
President of the Senate.

Approved June 27th, 1853.

LEONARD J. FARWELL.

STATE OF WISCONSIN, *Secretary's Office, ss;*

I, Charles D. Robinson, secretary of state of said State, do hereby certify that I have compared the foregoing with the original enrolled act deposited in this office, and that it is a correct transcript therefrom, and of the whole of said original.

In witness whereof, I have hereunto set my hand and affixed the great seal of said State at the capitol in Madison, this 27th day of June, A. D. 1853.

CHARLES D. ROBINSON,
Secretary of State.
By CHAS. GEO. MAYERS, *Dep'y.*

An act to change the name of the "Racine, Janesville, and Mississippi Railroad Company."

The people of the State of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. The name of the "Racine, Janesville, and Mississippi Railroad Company" is hereby changed to that of the "Racine and Mississippi Railroad Company," by which last name it shall hereafter be known and called.

SEC. 2. This act shall take effect immediately after its passage.

C. C. SHOLES,
Speaker of the Assembly.
JAMES T. LEWIS,
Lieut. Gov. and Pres't Senate.

Approved March 31st. 1855.

WM. A. BARSTOW.

STATE OF WISCONSIN, *Secretary's Office, ss:*

The secretary of state of the State of Wisconsin does hereby certify that the foregoing act hereto annexed has been compared with the original enrolled act deposited in this office, and that the same is a true copy thereof, and of the whole of such original.

In witness whereof, I have hereunto set my hand and affixed the great seal of the State at the capitol in Madison, this 31st day of March, 1855.

A. T. GRAY,
Secretary of State.

192 Mr. Durand was then recalled and examined by Mr. De Wolf:

Q. I want you to look at that contract, and state whether that or similar contracts were entered into by the company in regard to the payment of interest and indemnity for those notes and mortgages, or whether it was one of them that was used by the company.

A. That is not the usual contract.

Q. Is that one *one* of the contracts that were thus used?

A. This is my signature.

Q. That is not the usual one?

A. They were signed in blank. That is one form of contract they entered into at the time of making their subscription to the stock.

192½ Whereas, Mark F. Pierce has executed a note and mortgage in favor of the Racine, Janesville, and Mississippi Railroad Company, or bearer, bearing date on the seventh day of April, A. D. 1855, payable on the 10th day of February, A. D. 1866, for the sum of one thousand dollars, with interest annually at the rate of ten per centum per annum from and after the tenth day of February, 1855.

And whereas said note and mortgage have been received in payment of ten shares of the capital stock in said company:

Now, therefore, in consideration of the relinquishment and assignment by the said Mark F. Pierce to the said company of so much of the dividends on said stock which the said Mark F. Pierce may become entitled to, as shall be sufficient to pay the interest on said note, the said company agrees not to demand said interest from the said Mark F. Pierce, and in case said note and mortgage shall be negotiated by said company, then said company agree to save the said Mark F. Pierce harmless from said interest and any loss whatever from his said subscription.

And the said Mark F. Pierce hereby assigns to the said company so much of any dividends to which he may become entitled on said shares as shall be sufficient to pay off said interest.

In witness whereof, the board of directors of said company have caused these presents to be signed by their president and secretary, and to be sealed with their corporate seal, this seventh day of April, A. D. 1855.

[SEAL.] H. S. DURAND, *President.*

A. J. REDBURN, *Secretary.*

193 Q. (Offering witness another paper.) State whether that is the usual form or whether there was another.

A. That was the blank they used; that is the form.

By Mr. De Wolf:

It is a contract by the company seeking to establish the fact that the company aggree with the party to pay the interest on the note or obligation.

(Objected to.)

Admitted subject to objection.

Whereas, Josiah N. Grant has executed a note and mortgage in favor of the Racine and Mississippi Railroad Company, bearing date on the 21st day of March, A. D. 1856, payable in five years from the tenth day of May, A. D. 1856, for the sum of one thousand dollars, with interest annually, at the rate of ten per cent. per annum from and after the said tenth day of May, A. D. 1856; and whereas said note and mortgage have been received in payment of ten shares of the capital stock in said company:

Now, therefore, in consideration of the relinquishment and assignment by the said Josiah N. Grant to the said company of so much of the dividends on said stock which he may become entitled to as shall be sufficient to pay the interest on said note, the said company agree not to demand said interest from him, and in case said note and mortgage shall be negotiated by said company, then said company agree to save him harmless from said interest.

And the said Josiah N. Grant hereby assigns to the said company so much of any dividends to which he may become entitled on said shares as shall be sufficient to pay off said interest, and agree to pay said principal sum when the same shall become due.

And the said company agree to pay all surplus dividends over and above said ten per cent. to said Josiah N. Grant, and to pay the whole dividends arising upon said stock after said term of five years, to said Josiah N. Grant.

In witness whereof, the board of directors of said company have caused these presents to be signed by their duly constituted agent, M. Z. Landon and Henry Smith, and the said Josiah N. Grant has also set his hand and seal this 21st day of March, A. D. 1856.

MILES Z. LANDON. [L. S.]
H. SMITH. [L. S.]
J. N. GRANT. [L. S.]

194 Q. You will state to the jury whether there was ever more than one board of directors elected for the Racine and Mississippi Railroad Company; that is, whether there were two boards.

A. There was never but one board at the time.

Q. Was there ever any board of directors elected in the State of Illinois for the Rockton and Freeport company, or for the Savanna Branch after the consolidation?

A. No, sir.

By the court:

When was the consollidation of the Savanna branch?

A. The 23d of January, 1856.

Q. At the time of the consollidation of the Rockton and Freeport Railroad Company, had there been any route determined upon or anything done by the Rockton and Freeport Railroad Company toward the building of a railroad?

A. There had not been.

Q. When were the town and city of Racine bonds sold, or about the time?

A. I should think in 1854.

Q. Was there any guaranty of those bonds as to the payment of money and interest at the time of selling, or at any time when they were absolutely disposed of?

A. I think there was. The company guarantied the payment of the interest semi-annually, and also the principal at maturity.

Q. On the first of May, 1856, had the Racine and Missis-
195 sippi railroad sold any farm mortgages previous to that time?

A. I do not remember positively.

Q. Well, what is your recollection as to their having sold any farm mortgages previous to that time?

A. My impression was that they had.

Q. Will you state as near as you can the amount of such?

A. I could not state.

Q. Could you not state anything definite?

A. I could give no idea.

Q. Is the statement of the amount contained in the report of '56 correct?

A. I presume it is; I have no doubt it is.

Q. Were all those mortgages sold accompanied with a guaranty by the bonds of the company when they had been sold?

A. I should think they were.

Jacob Laber, a witness called in behalf of the defence, being duly sworn, was examined in chief by Mr. DeWolf, and testified as follows:

Q. Mr. Laber, are you the defendant in this case?

A. Yes, sir.

Q. Did you give at any time a note and mortgage to the Racine and Mississippi R. R. Co.?

A. I did.

Q. When was it given, or about when?

A. In 1856.

Q. Did you ever give more than one?

A. No, sir.

Q. Who obtained the subscription to this stock for which you gave that note and mortgage; who were present; where was it taken?

196 A. At my house.

Q. Was there any other subscription at the time given to the stock?

A. Yes, sir.

Q. Who obtained that subscription; who took it from you?

A. One Dornblaser and Bush.

Q. What statement, if any, were made to you about the note and mortgage? State what was said to you about the condition of the company, if any.

A. The road from Racine to Delavan is finished and pays 30 per cent. interest.

Q. What else did they say to you?

A. They had $100,000 for and the right to build the road from Beloit to Rockton and Freeport.

Q. By this company?

A. Yes, sir.

Q. What did they say to you about their being in debt?

A. It was all paid.

Q. What did they say, if anything, about the payment of any interest upon the notes you should give; what was said to you?

A. They said they would pay all the interest on the note and mortgage they should give?

Q. Did they give you any contract for the payment of interest?

A. Yes, sir.

Q. Where is that contract?

A. I have lost it.

Q. Was it a written or a printed contract?

A. A printed and written.

Q. Have made any examination; what examination have

197 you made to ascertain where that contract is; where did you keep it?

A. In a chest.

Q. In a chest?

A. Yes, sir; I hunted all my papers over, and could not find it.

Q. Did you look everywhere about the house?

A. No, sir; I had it all in one place, and I don't know what has become of it; I cannot find it.

Q. What was this contract?

A. I think the contract was to save me from all interest and all expense.

Q. Anything said about losses?

A. They saved from that.

Q. Have you ever had any conversation with the plaintiff in this case, or any person, after the making of that mortgage, about that mortgage?

A. No, sir.

Q. Have you ever seen any person; if so, when, after you made the first purchase of it?

A. No, sir.

Q. Since the purchase, have you had any conversation with any person claiming to own the mortgage, anywhere?

A. No, sir.

Q. Did any person call upon you for the payment of the mortgage, or say anything about it at any time?

A. Yes, sir; in 1858 Cooper called upon me, or a man calling himself Cooper, and said he had a mortgage against me.

198 Q. What was the conversation between you and Mr. Cooper at that time? State all that was said.

A. He did not talk much about it; he said he wanted another mortgage.

Q. What did you tell him?

A. I told him I could not give him any.

Q. What else was said?

A. Those that took these mortgages, the people ought to tar and feather them, and send them on a rail out of the country.

Q. Did you say anything to him about the mortgage?

A. No, sir.

Q. Did you say anything to him more than what you have stated?

A. No, sir.

Q. He wanted you to give him a new mortgage, and you told him you could not?

A. Yes, sir.

Q. Was there anything said to you as to a settlement of the mortgage; any proposal made, or any settlement?

A. No, sir.

Q. Is that the only conversation you ever had with any person after giving the mortgage?

A. Yes, sir.

Q. That was sometime in 1858?

A. Yes, sir.

Cross-examination by Mr. Umlauf:

199 Q. For what purpose did you take the railroad stock?
A. To improve the country.
Q. To help the railroad company?
A. Yes, sir; to help the country.
Q. Do you think the railroad through the country was an improvement?
A. Yes, sir; I think so.
Q. In what respect did you suppose it to be an improvement? What made you think it would be an improvement to that part of the country?
A. So that we could carry our things away?
Q. How far from the railroad station were you before this road was opened? your residence; your farm?
A. At Freeport.
Q. How far was it from that place?
A. Twenty to twenty-five miles.

By the court:

Q. From your place to Freeport?
A. Yes, sir; from twenty to twenty-five miles.
Q. How near are you to the depot now on this road?
A. About three miles.

By Mr. Umlauf:

Q. Did you suppose, sir, that the construction of this road would also enhance the value of your property?
A. I should think so.
Q. Then you mean to say that it enhanced the value of your property?
A. Yes, sir.
200 Q. Well, now, did it?
A. It did; I am nearer to the railroad than I was before; I can send my things better.
Q. What was the comparitive value of your land before the line of railroad was constructed befor you gave this note and mortgage; in other words, what was your farm worth about that time?
A. About fifteen or twenty dollars an acre.

By the court:

Q. You mean in 1856?
A. Yes, sir.

By Mr. Umlauf:

Q. When you gave this mortgage?
A. Yes, sir.
Q. What is it worth now per acre?
A. I don't know; it is worth $40 any way.
Q. Would you sell it to me for $50?
A. Would you give it?
Q. Well, I don't know; I may get some money somewhere; I would

like to have you be kind enough to tell me whether you would take $50 per acre?

A. I never calculate to sell it, because I want it for my home.

Q. Suppose you did want to sell it, what would you sell it for?

A. I don't know.

Q. Well, to your best knowledge?

201 A. I could get at least $50 for it.

Q. How much land is there in that farm of yours?

A. One hundred and eighty-eight (188) acres.

Q. You have another farm in that vicinity?

A. No, sir.

Q. You had one, had you not?

A. No, sir.

Q. Never?

Ans. I sold it.

Q. When was it you sold it?

A. I sold it last summer a year ago.

Q. How much land was there in that tract?

A. Seventy acres.

Q. What was that worth per acre?

A. I sold it for forty (40) dollars.

Q. Was it as valuable a place as the one on which you reside, per acre?

A. It was not so valuable per acre.

Q. How long had you owned that land before you sold it?

A. About one year and a half.

Q. You only owned a year or a year and a half?

A. Yes, sir.

Q. At the time you gave this note and mortgage, did you own any other land except the land you mortgaged?

A. No, sir.

Q. Nor any other since?

A. No, sir.

Q. When Bush and Dornblaser came to your house to take this note and mortgage, had you not made up your mind to take

202 stock in the Racine and Mississippi Railroad Co.?

A. No, sir.

Q. You had not?

A. No, sir; I took a notion to take a thousand dollars. Dornblaser and Bush came to me before I could have time to consider about it; and Dornblaser coaxed me. He took out a mortgage and handed it to me; he said it is all no use; pay well; and that was the last.

Q. Did you not agree with some party, some officers of the railroad company or some other party, to take a thousand dollars, ($1,000,) ten shares of the stock, before the time when these men called upon you; had you not made up your mind to that effect?

A. Yes, sir.

Q. How long before that time?

A. Before Dornblaser and Bush came to my place.

Q. How long before that time?

A. About two or three days.
Q. Not longer?
A. No, hardly that, they came so quick, I didn't think.
Q. Did you say when they came around to take your subscription, that you would take just as much as a neighbor of yours their had taken, or would take? Did you not say that?
A. Some took a thousand dollars.
Q. No; answer my question, please.
A. What is your question?

203 Q. Did not you say to Bush and Dornblaser, or some of those men, when they called upon you to take your subscription, that you would subscribe just as much as any of your neighbors?

A. No sir, not as I remember.
Q. What did you intend to do with the stock that you received from the railroad company?
A. Dornblaser said he would take it from me as soon as—
Q. What did you intend to do with it?
A. I did not intend to do anything with it. I did not think it would make me richer.
Q. Did you not think so at the time?
A. No, sir.
Q. Then you took this as a gift from the railroad company; you took this $3,700 worth of stock as a gift, as a present from the railroad company?
Ans. I do not know.
Q. Did you understand it so at the time; that it was a mear present from the railroad company to you?
A. I do not know whether they will pay me. I have never received any thing.
Q. Well did you consider it a present from the railroad company? Answer that question Mr. Laber.
A. I will not do it.
Q. I think you might, it is a very simple question.
A. Oh, it is no use.
Q. I want to ask you Mr. Laver, at the time when you gave your note and mortgage and took the stock and certificate for 37

204 shares of stock in that company as a present from the railroad company, or did you intend to pay anything for it?

A. They promised me I would never have anything to pay.

By the Court:

Q. He asks you whether you expected that you never would have anything to pay?
A. I expected what they said was true; I thought it was all right.

By Mr. Umlauf:

Q. Did you think that stocks worth anything at the time?
A. I believed they were telling me the truth. I did not think they were telling me any lies.

Q. You did not know anything about it?

A. No, sir.

Q. Mr. Laber, did you ever see that gentleman before? (pointing out a gentleman.)

A. Not that I know of.

Q. Is it not true that soon after you gave your note and mortgage to this company, some parties came round to your place and looked at your premises to see whether they were sufficient security for the note?

A. Never; never seen any men; but my family seen some men coming and they told me of it, that is all; my family was out getting some water, and they saw a man coming along with a piece of paper in his hand, that is all that I have heard.

Q. How soon after the giving of this mortgage was it?

205 A. I cannot remember. It was not very long; about a month or so. I do not know. I cannot remember how long it was.

Q. How often has payment been demanded of you on this note and mortgage?

A. Two or three times I guess.

Q. Once you say Mr. Cooper demanded payment of you, or some party by that name?

A. Yes, sir; you and Cooper was there.

By the court:

Q. When was that Mr. Laber?

A. It was about four years ago.

Q. Was it the same time that you spoke of before—in '58?

A. Yes, sir.

Q. You know you said Cooper was there in '58, has he been there since with Mr. Umlauff?

A. Yes, sir.

Q. How often?

Ans. Once.

Q. Once afterwards?

Ans. Yes, sir.

Q. Was your conversation, at the time of the giving of this note and mortgage, with Messrs. Bush, Dunblaser, and Davis, in English or German?

A. German.

Q. With whom did you converse in German?

A. Dornblaser.

Q. Did you converse with any one else?

A. No, sir.

Q. Did not say a word to Bush?

A. No, sir.

Q. Did not say a word to Davis?

206 A. No, sir, I only talked with Dornblaser.

Q. Could you talk English at that time?

A. Not very well.

Q. Where were you born?

A. About two or three days.
Q. Not longer?
A. No, hardly that, they came so quick, I didn't think.
Q. Did you say when they came around to take your subscription, that you would take just as much as a neighbor of yours their had taken, or would take? Did you not say that?
A. Some took a thousand dollars.
Q. No; answer my question, please.
A. What is your question?
Q. Did not you say to Bush and Dornblaser, or some of
203 those men, when they called upon you to take your subscription, that you would subscribe just as much as any of your neighbors?
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Q. What did you intend to do with it?
A. I did not intend to do anything with it. I did not think it would make me richer.
Q. Did you not think so at the time?
A. No, sir.
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A. I believed they were telling me the truth. I did not think they were telling me any lies.

Q. You did not know anything about it?

A. No, sir.

Q. Mr. Laber, did you ever see that gentleman before? (pointing out a gentleman.)

A. Not that I know of.

Q. Is it not true that soon after you gave your note and mortgage to this company, some parties came round to your place and looked at your premises to see whether they were sufficient security for the note?

A. Never; never seen any men; but my family seen some men coming and they told me of it, that is all; my family was out getting some water, and they saw a man coming along with a piece of paper in his hand, that is all that I have heard.

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Q. How often has payment been demanded of you on this note and mortgage?

A. Two or three times I guess.

Q. Once you say Mr. Cooper demanded payment of you, or some party by that name?

A. Yes, sir; you and Cooper was there.

By the court:

Q. When was that Mr. Laber?

A. It was about four years ago.

Q. Was it the same time that you spoke of before—in '58?

A. Yes, sir.

Q. You know you said Cooper was there in '58, has he been there since with Mr. Umlauff?

A. Yes, sir.

Q. How often?

Ans. Once.

Q. Once afterwards?

Ans. Yes, sir.

Q. Was your conversation, at the time of the giving of this note and mortgage, with Messrs. Bush, Dunblaser, and Davis, in English or German?

A. German.

Q. With whom did you converse in German?

A. Dornblaser.

Q. Did you converse with any one else?

A. No, sir.

Q. Did not say a word to Bush?

A. No, sir.

Q. Did not say a word to Davis?

206 A. No, sir, I only talked with Dornblaser.

Q. Could you talk English at that time?

A. Not very well.

Q. Where were you born?

A. In Pennsylvania, Union county.
Q. How long did you reside in Penna.
A. I left Penna. in 1844, and was born in 1809, now you can figure it out how long I did.
Q. Did you then go directly to the State of Illinois?
A. Yes, sir.
Q. On the place where you now reside?
A. Yes, sir.
Q. Have you resided there ever since?
A. Yes, sir.
Q. Did you never threaten violence to any party who would come to demand of you payment for this note and mortgage?
(Objected to.)
Q. Have you got that railroad stock yet?
A. No, sir.
Q. You never got it?
Ans. No, sir.
Q. What has become of it?
A. I do not know.
Q. Has your counsel got it?
Ans. I do not know.
Q. Did you not sell it to any body?
A. No, sir; I do not know what has become of it.
Q. Did you ever attend any meetings of the railroad company to elect officers?
Ans. No, sir.
Q. Never attended any meetings?
A. No, sir. There was no use. I could not talk English, and so could not do any good.
Q. Is it not true that your neighbors—
(Objected to.)

207 By the court:

Hear what the question is. Put your question Mr. Umlauf.
Q. Mr. Laber is it not true that the community in general, in the place in which you reside, were very anxious and desirous to assist the construction of this railroad, to take stock in the company, and to do all that they could do to secure the road?
(Objected to by the counsel for def't.)

By the court:

So far as this defendant is concerned he admits it. He gave his note and mortgage because he wanted the road, and they all wanted it. It was a farming and agricultural country, and they wanted the road to go through it. It is hardly worth while to take time about it.
Q. You state that Mr. Cooper was at your place in 1858.
A. Yes, sir; I think it was in '58.
Q. As I understood you, he told you that the men that had got the subscription ought to be tarred and feathered and taken out of the country on a rail?

A. Yes, sir.
Q. Did he tell you why he thought so?
A. They went around and made people believe it was good for them and lied to the people.
Q. Did he tell you that they lied to the people?
A. They knew very well that it was not so, and that the road didn't pay.
208 Q. The road didn't pay?
Ans. No, sir.
Q. Did he tell you what they had told you when they got your mortgage, Mr. Cooper?
A. No, sir.
Q. Did he tell you how he knew what they had told you?
A. No, sir.
Q. He said that they ought to be carried out of the country on a rail because they had lied to you?
A. Yes, sir.
Q. Why did he say so?
A. He thought it was wrong, that is what he said; that is the way we ought have done it. I did not know as he ment to do it, but he said somebody ought to do it.
Q. What Mr. Cooper was this?
A. I don't know what his name was.
Q. How old a man was he?
A. I don't how old a man he was.
Q. About your age?
Ans. I think so.
Q. How old are you now?
Ans. Fifty-seven years.
Q. He was not older than you?
Ans. I don't know; he was a fleshy man.
Q. Was he a tall man?
Ans. He was a heavier man than I am.
Q. Was he taller?
A. I didn't measure him; he was a heavier man, he was a fleshier man.
Q. Was he bigger than you?
A. I think so; I don't know, I didn't measure.
Q. Was it that Mr. Cooper which I point out to you?
A. I don't know.

By the court:

Was that the man? (pointing out a man.)
209 A. No, sir.

By Mr. Umlauf:

Ques. You never saw this man?
A. No, sir.

By the court:

Ques. What time of the year was it that Mr. Cooper was there?
A. It was after harvest; I cannot remember.
Q. In what year was it?
A. I should think it was in 1858, when he was there first.
Q. Was there not any one with him?
A. Yes, sir; there was a man with him. I don't know who he was.
Q. Didn't you tell him about the railroad company at that time?
A. No, sir; I could not talk good English at that time. I heard since he could not understand me, and I could not understand him.
Q. You could understand that very well.
Ans. What?
Q. Then you mean to say you had no other conversation with Mr. Cooper upon the subject of the note and mortgage?
A. No, sir; I couldn't understand English.

By Mr. De Wolf:

Q. You took stock on the ground that you believed what they said was true?
A. Yes, sir.

Mr. De Wolf offers in evidence the bond of the Racine and Mississippi Railroad Company for $3,700, attached to the mortgage of Jacob Laber. It is admitted by Mr. Umlauf that the note of Jacob Laber in this case was attached to the bond of the company and the mortgage of the defendant, the whole being coupled together with eyelets in the following order: 1st. Bond of company; 2d. Note; 3d. Mortgage of defendant, and that the counsel for the plaintiff separated the note of the plaintiff from the other instruments named when he brought this suit.

(To the introduction of which testimony Mr. Umlauf makes an objection for irrelevancy.)

Admitted subject to objection.

210 No. $\frac{641}{1897}$. $3,700.

UNITED STATES OF AMERICA, *State of Wisconsin:*

Racine & Mississippi Railroad Company.

Know all men by these presents, that the Racine and Mississippi Railroad Company is justly indebted, and promise to pay to , or bearer, three thousand seven hundred dollars on the tenth day of May, 1861, at their office in the city of New York, together with interest thereon, from and after the tenth day of May, at the rate of ten per cent. per annum, payable semi-annually, on each tenth day of November and May, upon the presentation and surrender of the annexed coupons at the said office; to the payment whereof the said company hereby bind themselves firmly by these presents, and for the

better security of such payments being made to the holder hereof, the said company have assigned and transferred, and by these presents does assign and transfer, to the said holder of this bond, a certain note for the sum of three thousand seven hundred dollars, executed by Jacob Laber, Stephenson, Co., together with a mortgage given collateral to, and for the purpose of securing the payment of the same, dated on the sixth day of May, 1856, payable in five years from the tenth day of May, 1856, with interest at the rate of ten per cent. per annum, which said note and mortgage are hereto appended,
and are transferable in connection with this bond, and not
211 otherwise, to any parties or purchasers whomsoever.

And the said company do hereby authorize and empower the holder of this bond, at any time, in case said company shall fail to perform any of the foregoing stipulations, by neglecting to pay either principal or interest on this bond when the same shall become due, to proceed and foreclose the said mortgage, or take such other legal remedy on said note and mortgage against said mortgagor, or against this company on this present bond, or on both, as shall seem proper and expedient to said holder hereof.

In testimony whereof, the said company have hereto caused to be affixed their corporate seal, and these presents to be subscribed by their president and countersigned by their secretary.

By order of the board of directors, this twenty-ninth day of May, 1856.

H. S. DURAND, *President.*

[SEAL.] A. J. REDBURN, *Secretary.*

Three thousand seven hundred dollars.

$185. No. 10.

On the tenth day of May, 1861, the Racine & Mississippi Railroad Company will pay to the holder hereof, at their office in the
212 city of New York, one hundred eighty-five dollars, interest due that day on their bond, No. $\frac{641}{7}$.

A. J. REDBURN, *Secretary.*

$185. No. 7.

On the tenth day of November, 1859, the Racine & Mississippi Railroad Company will pay to the holder hereof, at their office in the city of New York, one hundred eighty-five dollars, interest due that day on their bond, No. $\frac{641}{1897}$.

A. J. REDBURN, *Secretary.*

$185. No. 4.

On the tenth day of May, 1858, the Racine & Mississippi Railroad Company will pay to the holder hereof, at their office in the city of New York, one hundred eighty-five dollars, interest due that day on their bond No. $\frac{641}{1897}$.

A. J. REDBURN, *Secretary.*

$185. No. 9.

On the tenth day of November, 1860, the Racine & Mississippi Railroad Company will pay to the holder hereof, at their office in the city of New York, one hundred eighty-five dollars, interest due that day on their bond No. $\frac{641}{1897}$.

A. J. REDBURN, *Secretary.*

213 $185. No. 6.

On the tenth day of May, 1859, the Racine & Mississippi Railroad Company will pay to the holder hereof, at their office in the city of New York, one hundred eighty-five dollars, interest due that day on their bond No. $\frac{641}{1897}$.

A. J. REDBURN, *Secretary.*

$185. No. 3.

On the tenth day of November, 1857, the Racine & Mississippi Railroad Company will pay to the holder hereof, at their office in the city of New York, one hundred eighty-five dollars, interest due that day on their bond No. $\frac{641}{1897}$.

A. J. REDBURN, *Secretary.*

$185. No. 8.

On the tenth day of May, 1860, the Racine & Mississippi Railroad Company will pay to the holder hereof, at their office in the city of New York, one hundred eighty-five dollars, interest due that day on their bond No. $\frac{641}{1897}$.

A. J. REDBURN, *Secretary.*

$185. No. 5.

On the tenth day of November, 1858, the Racine & Mississippi Railroad Company will pay to the holder hereof, at their
214 office in the city of New York, one hundred eighty-five dollars, interest due that day on their bond No. $\frac{641}{1897}$.

A. J. REDBURN, *Secretary.*

This indenture, made the sixth day of May, in the year of our Lord one thousand eight hundred and fifty-six, between Jacob Laber and Doratha his wife, of the county of Stephenson and State of Illinois, party of the first part, and the Racine and Mississippi Railroad Company, party of the second part, witnesseth, that the said party of the first part, for and in consideration of the sum of thirty-seven hundred dollars, to them in hand paid, the receipt whereof is hereby acknowledged, have granted, bargained, and sold, and by these presents do grant, bargain, and sell unto the said party of the second part, and to their assigns forever, all that certain real estate situated in the said State of Illinois, and known and described as follows, to wit:

The southeast quarter of section No. thirty-four, (34,) in township No. twenty-nine, (29,) north, of range No. nine, (9,) east, in the county of Stephenson, excepting a strip of land twelve rods in width, from off the north side of said quarter section, leaving one
215 hundred and forty-eight acres of land in said quarter section hereby mortgaged; also the north half of the north half of the northeast quarter of said section No. thirty-four, containing forty acres of land, making in all one hundred and eighty-eight acres of land; to have and to hold the above bargained premises, with the appurtenances, unto the said party of the second part and their assigns forever: provided, always, and these presents are upon this express condition, that if the said party of the first part, their heirs, executors, administrators, or assigns, shall well and truly pay, or cause to be paid to the party of the second part, or their assigns, the sum of thirty-seven hundred dollars, in five years from the tenth day of May, in the year of our Lord one thousand eight hundred and fifty-six, and interest thereon, from and after said tenth day of May, A. D. 1856, at the rate of ten per centum per annum, at the office of said railroad company, in the city of Racine, in the State of Wisconsin, according to the tenor and effect of a certain promissory note bearing even date herewith, executed by the said Jacob Laber, one of the party of the first part, to the said party of the second part, and shall pay all taxes and assessments upon said premises, and every part thereof, at
216 the time when the same shall become due, then these presents and the said note shall be null and void.

And the said party of the first part do further covenant and agree that they will pay all taxes and assessments of every nature that may be assessed on said premises previous to the day appointed by any law of the State for the sale of lands for taxes. And in case of the non-payment of the said sum and interest mentioned in said note, or any part thereof, at the time or times above limited for the payment thereof, or in case of the non-payment of any taxes that may be assessed on said premises in manner aforesaid; then, and in either case, it shall or may be lawful for the said party of the second part, or their assigns, and the said party of the first part do hereby further covenant and agree, and by these presents empower and authorize the said party of the second part, or their assigns, to grant, bargain, sell, release, and convey the said premises, with the appurtenances thereunto belonging, at public auction or vendue, and on such sale to make and execute to the purchaser or purchasers, his or their heirs and assigns, forever, good, ample, and sufficient deeds of conveyance in the law, pursuant to the statute in such case made and provided, and out of the monies arising from such sale to retain the principal and interest, which shall then be due on the said
217 note, together with the costs and charges, and all taxes, assessments, and charges on said premises, which may be paid by the said party of the second part, or their assigns, rendering the surplus monies, if any there be, to the said party of the first part, their heirs, executors, administrators or assigns, after deducting the cost of such vendue as aforesaid.

And the said Jacob Laber for himself, and his heirs, executors, and administrators, does covenant, grant, bargain, and agree to and with the said party of the second part, and their assigns, that at the time of the ensealing and delivery of these presents he is well seized of the premises above conveyed, as of a good, sure, perfect, absolute, and indefeasible estate of inheritance in the law in fee simple, and has good right, full power, and lawful authority to grant, bargain, sell, and convey the same in manner and form as aforesaid, and that the same are free and clear from all encumbrances of whatever kind or nature soever; and against all and every person or persons lawfully claiming or to claim the whole or any part thereof he will forever warrant and defend.

In witness whereof, the said party of the first part have hereunto set their hands and seals the day and year first above-written.

218 JACOB LABER. [L. S.]

her
DORATHA + LABER. [L. S.]
mark

Signed, sealed and delivered in presence of—
B. DORNBLAZER.
C. BUSH.

STATE OF ILLINOIS, *County of Stephenson, ss:*

I, a justice of the peace in and for said county, do hereby certify that Jacob Laber and Doratha Laber are personally known to me to be the persons whose names are subscribed to the foregoing mortgage, as having executed the same, appeared before me this day in person and acknowledged that they signed, sealed, and delivered the same, as their free and voluntary act and deed, for the uses and purposes therein set forth.

And the said Doratha Laber, personally known to me to be the wife of the said Jacob Laber, and as the person who subscribed said mortgage as such, having been by me acquainted with the contents and meaning of said instrument of writing, and examined separate and apart from her husband, acknowledged that she had exe-
219 cuted the same, and relinquished her dower and all rights whatever, whether of dower or otherwise, in and to the lands and tenements therein mentioned, voluntarily, freely, and without compulsion of her said husband, and that she does not wish to retract.

Given under my hand and seal at Rock Grove this sixth day of May, A. D. 1856.

[SEAL.] B. DORNBLAZER,
Justice of the Peace.

Abstract of title to the lands described in the foregoing mortgage.

STATE OF ILLINOIS, *Stephenson county, ss:*

I, Joseph B. Smith, clerk of the circuit court and ex-officio recorder in and for said Sephenson county, in said State, do hereby certify that Jacob Laber is the owner of the lands and premises de-

scribed in the foregoing mortgage, and that the same are free and clear from all encumbrances, as appears from the records of my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Freeport, in said county this 26th day of May, A. D. 1856.

[SEAL.] JOSEPH B. SMITH, *Clerk.*

This is to certify that we, the undersigned, at the request of the Racine and Mississippi Railroad Company, have examined the premises described in the foregoing mortgage, and find the same to be worth six thousand and five hundred dollars, at a fair and reasonable valuation, exclusive of the value of all buildings, barns, and outhouses situated thereon.

R. W. SMITH.
C. BUSH.

Dated this sixth day of May, 1856.

Endorsed: "No. 1,897. $3,700. Jacob Laber and wife to the R. and M. Railroad Co. Dated May 6th, 1856. Mortgage. State of Illinois, Stephenson county, ss. Office of clerk of circuit court. I hereby certify that this mortgage was filed for record on the 24th day of May, A. D. 1856, at 8 o'clock a. m., and recorded in in book J of mortgages, page 114. Joseph B. Smith, clerk. By N. R. Ordway, dep."

Here the defendant rested.

Rebutting.

Henry S. Durand being recalled, was examined in chief, and testified as follows:

By Mr. Umlauf:

Q. About how many notes and mortgages of the description of the note and mortgage in question did you endorse while you were president of the Racine and Mississippi Railroad Co.?

A. How many?

Question. Yes, sir.

A. I should think a thousand. I don't know as there was as many as that, but a large proportion. I should think a thousand of them.

Q. When did you make the first endorsement?

Ans. I could not say.

Q. About when and in what year?

Ans. Well, I should say the winter of 1857 and 1858.

Q. How long did you continue to make them after that time?

A. Well, I should think for three years—perhaps longer.

Q. Did the board of directors know of that fact?

A. They did, sir.

Q. Is the manner in which you endorsed this note the ordinary or usual way which these endorsements were made?

A. It is.

Q. When you made this endorsement in behalf of this railroad company, that is, on the paper of the railroad company, did you endorse any of them in any other manner except this? (Showing him the note.)

Ans. I do not think I did.

Q. Did the board of directors ever protest against your acts—against these acts of endorsing these papers?

A. They never did.

223 By the court:

Question. There is one of the witnesses who states that at a meeting of the board of directors the question came up as to the endorsement of these notes, and a vote was taken, and they voted that the endorsements should not be made on the authority given. Were you present at that meeting?

A. There never was a resolution of that kind ever presented to the board, or ever acted upon by the board. I will state that Dr. Martin, who was a director, at a meeting of the board, once drew up a resolution of that kind, and showed it to me, and asked me if I thought it would be proper for the board of directors to pass such a resolution. I told him to show it to the other members. He did show it to the other members, and they were all opposed to it, and said to me that it would be regarded worse than larceny to have sold papers and received the money, to withhold a regular title by an act of the board of directors—to refuse to perfect the title that we had received pay for; and the resolution was not presented, but it was torn up, and never was presented to the board. Mr. Martin was opposed to endorsing these notes.

By the court:

Who is the witness spoken of?

A. By Mr. De Wolf: Mr. Stone.

Q. Mr. De Wolf says that heretofore you yourself swore to that effect.

Ans. Mr. De Wolf is mistaken. There is but one state of facts in regard to this matter. I have sworn in two or three courts repeatedly, at the instance of Mr. De Wolf and others. I have no
224 interest or motive in the world to misstate, and that is the record of my evidence everywhere—the same as I give it now.

By the court:

Mr. De Wolf says that he refers to an instance at Freport, in which you stated that there was a resolution of this kind passed by the board.

A. I never have been a witness at Freport.

Q. By Mr. De Wolf. A deposition used in the Freport, Mitchell & Deeds case.

A. I deny it in toto. I have never given any such testimony. There never was a resolution of that kind passed by the board, or ever offered in the board.

Q. Did you attend all the meetings of the board?

A. I did.

Q. All of them?

A. Almost all of them. After 1857 I was occasionally absent.

By the court:

Question. Will you not read the 4th interrogatory, and give your explanation of it?

(Interrogatory read.)

I have no recollection that the board of directors did pass any such resolution. The step was spoken of, and it was suggested by common concent that I had ample power, as president of the company and as financial agent having authority to sell, and I endorse these notes by such authority and no other. Mr. Stone is undoubtedly mistaken in his testimony. He is an inofensive man, but he is simply mistaken.

Q. Were the resolutions presented and voted down recorded?

225 A. I should think they would be.

Q. They ought to be?

A. Certainly, they ought to be. The secretary always keeps a record.

By a juror:

The resolutions that were offered and passed were always recorded?

A. Yes, sir; and I should think that resolutions that were offered and lost were recorded, though I would not say positively. There were very full records kept.

Q. Give the jury an idea what the general duties--

By Mr. De Wolf:

If the court please, I object to this whole testimony about the president's general duties.

By the court:

You had better wait until he gets though. You do not know what it is.

By Mr. Umlauf:

Ques. Were the duties which you performed, as president of the company, in behalf of this company, with the sanction of the board of directors?

By the court:

He has already stated as to that; the only thing materially connected with it would be what he has done in connection with these notes and mortgages.

Q. I will qualify my question, and add to it in connection with the sale, transfer, and endorsement of the note in question and similar papers.

By Mr. De Wolf:

I object to this testimony on the ground that Mr. Durand swears that his authority in the premises was derived from his authority as financial agent to sell securities, and that is in writing; and no other testimony upon this subject of authority should be given intill this resolution is produced, unless there has been counter official
226 action by the board of directors.

By the court:

The question is, what he can say as to the knowledge possessed by the board of the endorsement of these notes, such testimony is always proper.

A. I will state in answer to that, I have done it in repeated instances on the table where the directors were in session.

Q. Endorsed these notes?

A. Yes, sir; and every party who presented them, Judge Allen and Fisher, of Beloit, Mr. Holt, of Savanna, and Mr. Miller of Mt. Carroll, who were all directors and engaged in settling these mortgages and otherwise handling them. They used to bring these securities and want me to endorse them. They dealt in them and received them from Eastern parties. Judge Allen has done a great deal of this, so that nearly every member of the board had full knowledge of these endorsements.

Q. Was there any objection made?

A. Never any objection, except Dr. Martin one time drew the resolution I have named, and I believe he was convinced at that time that it would be exceedingly improper for the board to pass it, and did not present it under these circumstances.

Q. When you spoke of endorsing the mortgages?

A. The note itself—the obligation itself.

Q. I mean the blank endorsements you made on the notes.

A. I will state further, in answer to the question, that Dr.
227 Martin, who presented the resolution to the meeting upon the endorsement; before that, I asked the Dr. if I could do it, and he said yes.

By Mr. Umlauf:

Q. When you said that you endorsed these mortgages you meant to say—

A. It was simply the obligation.

Q. You meant the note of the company; the mortgage, did you?

A. The obligation which the note secured—the note or bond which the mortgage secures

Q. Did you ever take any stock in this railroad company?

A. I did, sir.

Q. To what amount, please?

Ans. $12,500.

Q. Did you otherwise pecuniarily assist in the construction and equipment of this road?

A. I did to a large amount.

Q. State to what amount and in what manner.

(Objected to and objection sustained.)

Q. Mr. Durand: What do you know in refferance to the 7,000 tons of iron mentioned in the supplement to the report of 1856? Was that iron purchased by the company, or what do you know about it?

A. The 7,000 tons of iron were purchased by the company. I purchased it myself, in connection with Mr. Strong and another man; over 5,000 tons of it was put in the road; one thousand tons of it was at New Orleans, purchased of Theodore Holt, of New York, at $66 a ton with security of payment after its shipment from New Orleans to Savanna, and then 1.000 tons of iron in New Orleans that
228 was carried from New York, or contracted for; afterwards that thousand tons was disposed of; we were defeated in getting means to use it as spedially as we anticipated, but 5,000 tons of the ballance was received and put into the road, and is there now.

Q. When did you dispose of that iron in New Orleans?

A. Two months afterwards, as it was found to be impractiable to use it?

Q. Was that after the issuance of this report?

A. Yes, sir; it was bought in February or March by contract.

Q. What do you know about those 14 locomotives mentioned in the supplement?

A. They were all contracted for; two of them were purchased at the locomotive works in Jersey City and one of them at the Manchester locomotive works, Manchester, N. H.

By Mr. DeWolf:

I do not make any issue on that; it is the unsound financial condition of the company at the time.

The contract was made at one time with the Roger's locomotive works for 12 of their locomotives. I made the contract myself, and they are all on the road to-day.

Q. How many, if any, were paid for at the date of this report, April, 1856.

A. The first one purchased was paid for in cash; the second was paid for in Racine city bonds; the next was paid for in farm mortgages, bought at New Hampshire; one bought at Cincinnati was also paid for in mortgages of Niles & Company, and the two first Roger's locomotives were paid for in cash, wholly cash. The contract for the 12 afterwards was paid 30 per cent. in mortgages and the
229 ballance on six months short time, any how equivalent to the cash. All that had been shipped and on the road, purchased to this time, I think had been fully paid for, and a number on the road, the precise number I do not recollect, but four or five I should think.

Q. Four or five were on the road.

A. Four or five were on the road, previous to this five there were several; I do not remember exactly the quantity.

Q. You cannot remember how many were in use at the date of this report?

A. Well, there were several in use previous to this five. I should think 4 or 5.

Q. How many were on the road to receive?

A. There was five more received within a few weeks after this. The date of their reception is stated in the report.

Q. Are these the names of the locomotives in question?

A. This is correct; the time they were received. There must of been five on the road previous to the contract for this 14, and of that five was then on the way ready to ship at April, '56; one was received in April, '56, two in May, '56, one in July, '56; one in September, '56, and one in August, '56; then there was more coming on. There has been ten received in the season of '56, five or more ready for shipment in April.

Q. Did you state how many of them were paid for at the date of this report?

A. The five that was previously on the road were paid for, and that five was ready for shipment. "The Rockton" that was bought
229½ in Cincinnati was paid for in mortgages and received in April, '56. "The Prairie Flower" was received in May, and another received in July; they were both shipped at the same time, but one was received in May and the other in July; the three were wholly paid for; also, "the Durand" received in September; that was four of them, and I know that four were paid for; the others I do not remember about.

Q. What do you know about these five passenger cars, Mr. Durand; were they at the date of that report on the track?

A. They were bought, sir.

Question. Were they bought?

A. They were bought and paid for in securities, the whole of them; three of them were bought of Bamey, Parker & Co., of Ohio, and paid for in Racine city bonds, and two of them were bought in Cleveland, and paid for in mortgages.

Q. How is it with the next item?

A. Eight hundred of these machine wheels were bought in Troy, and 800 were bought at Falls Village, Conn. Eight hundred were put on axles at Troy; part of the ballance were shipped to Dayton, Ohio, and part of them used in the cars we had built there, and part of them sold to Bamey, Parker & Co., towards payment of cars; part of the wheels went into our cars bought of Bamey, Parker & Co., and they took some of the wheels of us in payment for the cars. What was not shipped to Dayton, was shipped to Racine, and paid for. The axles were bought of the Mathew Manufacturing Company, at Seymore, Conn. These wheels and axles were paid for in securities wholly; town and city bonds and mortgages.

230 Q. State what you know in reference to these other items?

A. The springs were bought of the American Car Spring Company. I think that is the same.

Q. Had they been paid for?

A. Yes, sir, in securities; this 200 tons of bar iron was bought for our car work. We were building between two and three hundred cars at Racine at the time. I bought it myself. That I do not think was wholly paid for at the time; bought part for cash, and part on time. I do not recollect about it now.

Q. What proportion of it was paid for at the date of this report?

A. It was a cash article, and if it was not bought for cash, it was bought on very short time.

(Mr. Umlauf, here read statements of what Mr. Dornblaser stated in former deposition.)

Q. State what you remember in reference to this statement made by Mr. Dornblaser in referance to this iron?

A. I recollect there was one lot of iron bought, to be paid for on arrival of one thousand tons, of a man by the name of Crooks. That was the contract, and it was paid for on arrival, $62,500. I do not know what other lot of iron he refers to.

Q. He seems to refer to all this iron.

A. The road at this time was running to Delevan, 47 miles, at the date of that report. From April to the 26th of September following, we opened 22 miles more; and very speedily after that, we
231 opened it to Rockton, and then to Durand station, the estimated distance of which was 38 or 40 miles. Then it was subsequently opened to Davis station, which I think is 92 miles. I do not recollect precisely the distance now, which would have taken about 4,800 tons of iron and then we had something over 1,200 tons of iron laying on our wharf at Racine, which would of made something over 6,000 tons, 4,800 tons of it is now in the road, and that lay on the wharf at Racine, all but two or three hundred tons, was returned to the seller. I think we must have bought some of this iron, that is my impression. The company did not owe a dollar for it.

Q. What do you know about depot grounds, the railroad depot grounds at Beloit, at the date of this report?

A. The original depot grounds at Beloit were bought of five or six different parties; the principal part was bought of Goodhue, and they were paid for, part cash and part stock. The company afterwards bought quite an extensive addition, they did not require but a small part of it, with a view to resell the portion they did not require. They cound not buy any part without buying the whole.

Q. The items were mentioned in this report of bonds and mortgages on real estate would amount to $1,600; had they been obtained by the company at the date of this report, and had they been made available, or were they made available afterwards?

A. I could not state from my present reccollection, and I can only say this, the statements in that report are correct and were
232 correct at the time, whatever the statements are here. All these resources the company had on hand, and afterwards made them available. I believe all the mortgages were made available. It states it at $160,000 at this time. I have no doubt of the correctness of it.

Q. Can you state whether the whole report of 1856, from your knowledge, whether that is correct as is given here, or whether there are any items that are not correct, not true?

A. From the town of Beloit the company owed $100,000 for the grading of the road, a distance of about 44 miles. The contractors

Q. How many were on the road to receive?

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were to take in payment of this, $100,000 of Beloit bonds at 95 cents on the dollar, and then monthly estimates were to be paid in cash and bonds in ratable portions, and accordingly $57,000 had been so disposed of. They were all disposed of except $10,000, and that left at this time $43,000 of bonds on hand. The contract was not yet compleated; fifteen per cent. was retained as security for the contract. The town of Rockton bonds, $50,000, were afterwards sold; $68,000 were obtained thus. The citizens of Racine subscribed $200,000 to it. The most of this $68,000 of the two hundred and odd thousand dollars had been paid for in actual cash and materials which was valuable to the company. I recollect that Mr. Strong, who was a director and the attorney for the company, wanted to have the people upon the line of the road feel that the sub-

233 scriptions in Racine were bona fide and that they expected to pay and be understood that the ballance would be got; by a vote the entire calls were made, and they gave their notes. I gave mine, and Mr. Strong gave his. Every subscriber that had not already paid up their stock gave their notes. And that is $68,000 of it; these were subscriptions that mortgages were not taken upon, so that most of these subscriptions were subscriptions which had been made, but the mortgages not yet taken—not converted into mortgages. The practice was when the agents called on these people simply take the subscription, sometimes the mortgage was not taken, did not stop to take the mortgage, sometimes not for months. These subscriptions, however, were chiefly in Walwouth and Rockton, and part of Winebago county, there is no question of the accuracy of those items, none at all. They were carefully examined by a committee of the board, they were brought before the board, and a committee appointed to examine the items, and the secretary was a man of great accuracy and integrity. The ballance sheet of our books was taken off monthly, our books were examined very often, and when large amounts of money were handled, the stockholders appointed a committee of investigation to investigate these reports and call upon the proper officers and examine the securities on hand.

234 Q. Was that report examined in that manner?

A. Yes, sir, we always wished them to examine it in detail, and we insisted that they should go to our engine-house, and our machine shops, and look at the material on hand, the tools, machinery, cars, locomotives and lumber.

Q. Mr. Durand, you will tell the jury what facts you understand differant in the testimony of these witnesses that are given here in the depositions, and all the matters in relation thereto.

A. I have already contradicted a portion of Dornblaser's statement in regard to the purchase of that material, which I understand he testifies that no part had ever been contracted for. He is mistaken. The iron, the locomotives, the passenger cars, the wheels, axles, car springs, and the iron, as here stated, was all contracted for: the contracts are in writing, and are on file at the company's office to-day. He stated that he looked in the company's books and

did not find any evidence of such contracts. He did not look in the right place. I have so stated to the jury that full 5,000 tons of this 7,000 tons of iron must have been purchased, for it is running in the road to-day, and then the road was running to Delavan, 46 miles; the next year it had been opened to Davis station, about 92 miles. It takes 100 tons of rails to the mile of railroad track. This road took more than that, as stations are very frequent, and extensive side tracks were laid. It is mostly a freight road, so that the rails then that year must have consumed 5,000 tons of iron, and there was about 1,400 tons in addition to that, was shipped and received at Racine and returned to the seller, when, we were obliged
235 to suspend the work in 1857. A thousand tons was contracted for in New Orleans. I have stated in regard to all these articles of the locomotives, these 14, besides 4 that were on the road previous, and are on the road to-day; there were 18 locomotives on the road prior to 1857; and these 1,600 car wheels on the road, 1,600 only providing for 200 cars, and he had over 300; and the 800 axles would only provide for 200. The car springs we had twice that quantity, and the bar iron we more than that; so that Mr. Dornblaser is mistaken about that iron; and he states that the representation that some iron was bought at New Orléans is also untrue. A thousand tons of iron was bought of Theodore Holt, of New York, for the North Missouri railroad. They were not able to use it and they sold. We made a contract for 1,000 tons, and that 1,000 tons would have laid 10 miles, and nearly the whole of this 10 miles was very low grade. In consequence of not getting means fast enough, and the great expense of getting that iron from New Orleans, it was re-sold; that contract was in writing, and we lost about $3,200 in that operation, in reselling the iron. We had to purchase, exchange, and in reselling the iron we had to make a small loss on it; so that when Dornblaser denies that, he is mistaken. Mr. Stone is mistaken somewhat as to the amount of the company's indebtedness prior to
236 June, 1856. The company's indebtedness on the first January, 1856, all told, was $380,715 12 cts. The company then had 47 miles of the road in operation at a cost of $1,314,625 76 cts., upon which was nearly a million of dollars, had been paid, and the company had of floating debts on the 1st of January of $380,000; a considerable part of that was for iron, and other materials, a portion of which had been entered at Buffalo, and put into the track between Delavan and Beloit early the next spring, so that all that was paid between that time and the first part of June was paid by Racine city and Delavan bonds; so that the indebtedness of the company on the first day of June, 1856. This was the 1st of January, 1856. that this report was issued, and that is according to the first of June, 1856. I do not know what the indebtedness of the company was, however it was very small at that time. So this Mr. Stone would be mistaken in the amount of the comp.'s indebtness. Mr. Stone also states that the company owed for claims for grading that were past due on the first of June, '56, and that the company did not have any settlement of until 1858. Mr. Stone is mistaken

about that. That grading was strictly a cash article, payable monthly
and the company made its payments regularly for grading at
237 day labor. There is no possibility of getting credit on that;
it is always cash, and there could not have been a debt for grading in my judgment until 1857; it would have been next to impossible. He also says grading and for building and purchasing the cars. I do not think we ever made a debt of a dollar for building and purchasing the cars. I do not remember that we ever made a debt of a dollar. Our cars were paid for in exchange for securities, and those that we built ourselves our men were paid every Saturday or at the end of every month, usually Saturday, and most of our cars that were made were built by mechanics in Racine, blacksmiths and woodworkers, in payment of then capital subscriptions to the capital stock, and there was no indebtedness on account of cars ever made. The company always owed money, and I never knew a company carry on work of that magnitude who did not. The iron of that road cost about $900,000 all paid for, every dollar of it cash. The bulk of our iron was payable by cash on arrival at New York and taken on demand, and duties paid in coin. Mr. Merrill, in his testimony,
speaks of the companys suspending their work for a time. He
238 thinks for six months the company did suspend the work of
grading. During the fall of '53, and for the reason that they previously made a contract with the old house of Schuyler for furnishing of the iron and getting stock of the road; and in the mean time they had been pushing the work of grading very rapidly, and had the work nearly completed when Schuyler failed, and we were disappointed in getting the iron, and as we had a new contract to make, it was impossible for us to do otherwise, and we suspended the work. We could have raised all the money necessary for grading, as about 200 per cent. was paid in bonds, and we had no difficulty in getting money at that time. We could always sell our bonds, and were also making loans. I never knew of the time we could not borrow money. The work was resumed the next spring. Mr. Merril speaks of the company's being pushed for means of paying in Ill. for work in Wisconsin. I think that was done repeatedly. The company did not use their means except for the work of the road, grading, and other purposes; and the extensive works of the lake terminus
at Racine for machine shops, was all as much for the Ill. por-
239 tion of the road as for the Wisconsin portion, and it was
entirely impossible to keep a distinction; but I do not think there was ever any more means paid by Illinois and for the work of Wisconsin, than was reimbursed by Wisconsin means. Mr. Merrill speaks of the company's being hard up for means. That is true; I never knew of a railroad company but was hard up. The company was never discredited, and no creditor was ever delayed a moment for his money if it was due. Mr. Davis and some others speak of certain representations that were made by the agents of the company in regard to these subscriptions. Of this I have no knowledge; I was not present; I never attended any public meetings held with reference to it; but this I do know, that no such misrepresentations

were ever authorized by the board of directors. I think some one testifies. I do not know that I am correct about it.

(Objected to, by the counsel for defendant, to testifying anything further than upon statements made of his own knowledge.)

I was about to answer some testimony in regard to a mortgage on the road. It was stated that they built the road to Delevan without mortgaging it; whereas it was represented to this party, the
240 fact that a mortgage had been executed, perhaps required, but no notes or bonds had been issued until after the road was completed to Delevan. No bonds issued or no indebtedness incurred under that mortgage. My impression is, there had been a mortgage executed for the purpose of securing bonds to be issued; but no bonds had been issued in building the road to Delevan. That is a matter of fact.

Q. Did you state that no bonds had been issued prior to June, '56?

A. The company had no bonds.

Q. I mean those bonds for which those mortgages were made to secure?

A. Oh! No, sir; I speak of the first mortgage bond, on the road.

Q. When were those bonds issued?

A. I do not remember exactly.

Q. I mean those mortgage bonds?

A. These bonds, $680,000, were not sold or negotiated until March, 1856. A negotiation was then made with a party from Scotland, but nothing was realized of them until the next August; that was what I referred to by that.

Q. When did the railroad company become insolvent? When did they fail to meet their obligations?

A. Well, I should say they never became insolvent. The company was frittered away by a foreclosure of the mortgage upon
241 the road. The whole mortgage was foreclosed for a default upon 18 months' interest.

Q. When was the mortgage foreclosed, Mr. Durand?

A. In 1859.

Q. Were these men—Davis and Dornblaser—agents of the company to take stock subscriptions for it?

A. They were never appointed by the board of directors, but they might have been employed to assist by regularly appointed agents. I do not know whether they were or not; they were never appointed by the board.

Q. Were ever any of the agents of the company authorized by the board of directors, or any of its officers, to make any different reports than what were contained in the annual reports?

A. They never were.

Q. Or any untrue statement of facts?

A. I should think they were not, sir.

Cross-examination by Mr. De Wolf:

Q. Mr. Durand, you say that Mr. Davis and General Dornblaser were never appointed as agents by the board of directors?

A. I think not.

Q. Did they not obtain, through that county, a large proportion of the mortgages and notes from the parties, or and were they not received by the company?

A. I think they assisted.

Q. Was not Mr. Davis one of the appraisers to appraise the land in Stephenson county?

242 A. My impression is he was employed in some cases.

Q. Could you say that there were any of these notes and mortgages refused by the company?

A. So far as the titles were good I do not they were.

Q. You stated that you never had any authority but the usual one to sell those notes and mortgages by any direct action of the board?

A. I have never said that.

Q. Did you not state to Judge Knowlton and myself, at our office on Clark street, in this city, in the winter of '62, that you never had been authorized by any order or resolution of the board of directors?

A. I presume I did.

Q. And did you not state, in addition to that, that you did not sign any of them, unless it was on one or two instances, for any person until '58, and then when Judge Knowlton asked you why you signed them, you said because you thought it equitable; did you not state that to Judge Knowlton and myself?

A. I would not be at all surprised but I did. The fact is, that I never was, by any special resolution, authorized to endorse them; but I was not only president of the company, but was also appointed by a resolution of the board a financial agent.

Q. I want to inquire if there were any other person or per-

243 sons connected with you in the appointment of financial agent than yourself, or were they appointed in any other than in the way you, yourself, was appointed? Was there not an order appointing yourself and Marshall M. Strong in '53 or '54?

A. There were three of us, and then there were frequent acts of the board.

Q. But these resolutions are all in writing.

A. I suppose they are all recorded.

Q. Now then were you not sworn in a case between Thomas Deeds and James Mitchell this last winter before justice McDonald in the city of Racine at his office, and did you not then and there testify, in substance, that your recollection was that an order refusing to give you the authority to assign these notes and mortgages by endorsement was passed at the same time, but you could not state the time, or words to that effect?

A. I never gave any such testimony or anything of the kind there or anywhere else.

Q. Are you positive of that?

A. Yes, sir.

Q. Well, sir, you say that Mr. Stone is mistaken in regard to the indebtedness of this company being $500,000, I ask you if this

244 report shows anywhere that the company are liable for $490,000 bonds of Racine city, which had been sold?

A. That would not be embraced in their indebtedness.

Q. Is it not contained in this report?

A. I have never looked it through.

Q. Was not that indebtedness bearing 8 per cent. interest?

A. No, sir; 7 per cent.

Q. Is the report in this pamphlet for 1858 true?

A. I never have said otherwise than that all these reports are true.

Q. In 1855, at a meeting of the board, was any resolution of this character ever passed, and was it correct? resolved that stipulations given by members of the board of directors and this company to April 9, 1855, be hereby guarranteed by the company; had there been guarrantees given by the company to that amount?

A. I do not know.

Q. Is that your recollection?

A. I have no recollection on the subject.

Q. Did the agents guarranty or the railroad company guarrantee on the farm mortgages to any considerable, and what *and what* amount? You do not know to what amount?

A. No, sir; I never gave any of these stipulations myself.

Q. Were you called as a witness in '63, at Racine, before justice McDonald?

245 A. I do not remember; I have been called so many times; I do not know.

Q. You state that there has been an amount of those guarrantees given, but you do not know the amount?

A. I do not know what they have been.

Q. Have you ever seen this resolution on the books of the company? what is your recollection in relation to that guarranty having been made? (Showing witness a resolution of the board of directors guarranteeing stockholders against any loss on $200,000 of farm mortgage stock.)

A. I have no distinct recollection.

Q. What would be your best recollection upon that subject?

A. I have no recollection. Yet I have no reason to doubt but such a resolution was passed by the board.

Q. You know that there was an indebtedness of this kind, but you cannot state the amount?

A. My impression is that Mr. Goodhue took some twelve or fourteen thousand dollars, having already a large subscription; that that additional stock was guarranteed. I have this impression. I do not now remember whether there was any other. I do not remember of any other, but that.

By Mr. Umlauf:

246 Q. Was it not the practice of the company that when appraisers were appointed to appraise the value of these lands, upon which securities were executed; was not the general rule that those appraisers should state every appraisement in writing, and attach it to the securities?

A. In all cases.
Q. And sign that statement with their own names?
A. In all cases.
Q. You would then say that if the name of a certain appraiser does not appear upon a security that he was not the appraiser in that case?
A. Yes, sir.

By Mr. De Wolf:

Q. Did you ever attend the appraisal of any one piece of this property?
A. No, sir.
Q. Do you know what their customs were farther than that you find these names on the certificates filed in the office?
A. That is all I know.
Q. All you know in relation to this is simply that the name of appraisers appear on the mortgages?
A. It does not occur to me that I have seen his name on these mortgages.

By Mr. Umlauf:

Q. But if he was, his name would appear on the security?
A. Suppose you and myself were appointed appraisers, we
247 might get Davis to give us his opinion, and we should govern our opinion by his, that would be the sense in which we would certify to the property. How far Mr. Davis had an agency of that kind I do not know, sir—perhaps very extensively.

Mr. Samuel I. Davis being called as a witness and duly sworn, was examined in chief by Mr. Umlauf, on the part of the plaintiff, and testified as follows:

Q. You have given your deposition in this case, have you not?
A. Yes, sir.
Q. When did you become a stockholder in the Racine and Mississippi Railroad Company?
A. I cannot tell you the exact time. I was among the first mortgage stockholders taken in Stephenson county.
Q. About what time?
A. I think it was in '55 or '6—May—the mortgages were nearly all dated in the month of May, about the same time this was taken.
Q. To what amount?
A. Twelve thousand five hundred dollars, myself and brother.
Q. How did you buy that stock?
A. By giving mortgages on real estate we were to have stock, but I have received no stock yet.
Q. Who were present at the time when this note and mortgage were sold or transferred at your house?
248 A. Which mortgage do you mean?
Q. By the defendant, Mr. Labie?

A. Mr. Strong and Mr. Cooper.

Q. Was Mr. Wilkinson?

A. No, sir.

Q. Was he not in town that day nor the day before?

A. Not that I know of; I think he was not there at all; he was there afterwards; it was afterwards that he was there. This was, I think, in the month of June or the first of July. Mr. Wilkinson, the first time I saw him these was in August or September following.

Q. Have you seen that gentleman before?

A. Yes, sir; I saw him at my house two or three years ago; I do not know whether that is the gentleman who bought the mortgage or not. I could not tell; I saw him and another gentleman and yourself.

Q. Did you go with Mr. Strong and other parties to view the premises of the defendant?

A. Yes, sir.

Q. Who was with you?

A. Mr. Strong and Mr. Cooper, and somebody else; I cannot tell; I do not remember just now.

Q. Did you see the defendant at that time?

A. No, sir; I think not.

Q. Did you stop at his place?

249 A. I could not tell you, sir, whether he did or not; we drove by so that he might see the place and view it. I do not think he got out, although he might have.

Fletcher Cooper, a witness, being called in behalf of the plaintiff, was examined in chief by Mr. Umlauf, and testified as follows:

Q. What is your name?

A. Fletcher Cooper.

Q. Are you the son of the plaintiff in this case?

A. I am.

Q. What is the age of the plaintiff at the present time?

(Objected to giving testimony about the age of the plaintiff, as that is not in issue. Objection overruled.)

A. He is in his 80th year; will be 80 years in June, I heard him say; he lives in New York.

Q. What is business?

A. A farmer; always was a farmer.

Q. Has he ever been a banker or broker in securities or stock or money?

A. No, sir; he has not.

Q. Were you deputized by him to examine certain securities with any other parties?

A. Yes, sir; I was to examine securities of the Racine and Mississippi Railroad Company.

Q. State what you know in relation thereto, and what you did?

A. Mr. George Wilkinson, agent for this company, sold those notes and mortgages in New York State, and my father examined

250 many of them, and he stated to me that he would take a num-

ber of them if, upon examination, he was satisfied the securities were good; and I was sent out for that purpose in June, 1856, and took a number of those mortgages through Mr. Wilkinson, the agent. I found Mr. Wilkinson at Morrison, Ill., at that time; he was out here on that business and business of his own, and that was my instruction to find him first and go with him to examine those securities. I went with him to Racine, and Marshall M. Strong, who was attorney for this company, went with us to this place, Davis station, and when there we followed on the line of the road the whole distance, and Mr. Wilkinson was with me all the time during that transaction; he was with me at the time we were to Mr. Davis's store, when the papers were exchanged, when I took these securities and paid the money for them; and it was through Mr. Wilkinson that I negotiated those papers, and the money was paid at Davis station.

Q. Did you go and see the security?

A. I did, in company with Messrs. Strong and Wilkinson. We stopped at the place, at the defendant's place. Mr. Laber was
251 not at his house, but in the field near his house, and he was interrogated by Mr. Strong, I think, in relation to what business we were there for, to examine into the security, and know whether it was sufficient.

Q. Did Mr. Laber say anything?

A. Mr. Laber intimated that it was worth twice the security, and laughed at the idea that we should doubt anything of the kind.

Q. The note and mortgage of the defendant were already, then, at that time executed?

A. Yes, sir; they were all drawn and exhibited for sale.

Q. Did you ever see these (handing book to witness) pamphlets or pamphlets of a similar kind?

A. I saw no pamphlet at all during the interview there.

Q. Have you ever seen any of those pamphlets?

A. Never have, until now.

Q. Did Mr. Strong or any party give you any papers or documents of the company which had relation to the construction and equipment, and the financial affairs of the railroad company?

A. No, sir.

Q. Was anything said to you in reference to the financial condition of the Racine and Mississippi railroad at that time?

A. No, sir.

Q. Or ever since?

252 A. Not that I recollect of.

Q. Were no representations made to you as to the success of the enterprise, or anything of that kind, since you were there?

A. No, sir; there was nothing said in relation to anything about the success of the enterprise; and even if the enterprise failed, we considered these securities sufficient.

Q. Did Mr. Davis make any exertions to induce you to take these securities?

A. I recollect seeing Mr. Davis then, and he appeared very anxious to have securities taken, and have the road completed, in order

to raise funds to build the road. He seemed to be anxious for the company in doing what he could for it.

Q. Do you know in what manner the defendant executed these papers, or what representations were made to him at the time?

A. No, sir; I do not.

Q. Have no knowledge of any representations being made?

A. No, sir.

Q. How much did you pay for this note and mortgage?

A. Par, with the exception of the difference in exchange on New York and Ill.

By the Court:

Q. You gave exchange on N. Y. for it?

A. Yes, sir.

253 Q. You gave the face of the instrument, less the exchange?

A. Yes, sir.

Cross-examination by Mr. De Wolf:

Q. The time you went to Mr. Lalor's, and Mr. Davis was with you, did you go to Mr. Davis's house?

A. I will not be certain, it strikes me we were in that vicinity.

Q. Does he reside some three or four miles from the station?

A. He resides some little distance; he was at his store.

Q. At the time this transaction took place were you engaged with the Troy Manufacturing and Iron Company?

A. No, sir.

Q. You bought some ten or fifteen thousand dollars of these mortgages?

A. Over sixteen or seventeen thousand; at that time my father had taken up a mortgage of sixteen thousand dollars which were all in drafts on the company, and I took those and invested them in those mortgages in good faith.

Q. You took some sixteen thousand dollars at that time?

A. Yes, sir.

Q. Was any person with you besides Mr. Davis, Mr. Wilkinson, and Mr. Strong?

A. I do not recollect that Mr. Davis was with us; Mr. Wilkinson was with me all the time.

254 Q. Which side of the railroad was this place when you saw Mr. Laber? Was it east or west?

A. I could not tell.

Q. Did you stay all night at Mr. Davis's?

A. Yes, sir.

Q. Did Mr. Strong make any statements as to what had been done?

A. I do not recollect anything of that, because we were then selecting out the mortgages.

Q. Were you not there for the purpose of examining the character of the securities?

A. Yes, sir.

Q. Did you not understand from Mr. Strong that this was to build a railroad in Illinois that those mortgages had been given?

A. To build the road from Racine west.

Q. Did you not understand from Mr. Strong that these securities were given to build a road in Illinois?

A. No, sir.

Q. Did not Mr. Strong compare notes with you as to this railroad?

A. No, sir.

Q. Did you have no question presented as to the reasons why men could be induced to take such a large amount of stock?

A. There might have been something said in regard to the matter. My business was to see the bonds. Something was said in
255 relation to the railroad.

Q. Did it not occur at the time that it was a very extraordinary course for the farmers, and did you not on that account make inquiries for the purpose of satisfying your mind?

A. It was always understood that the manner of selling the money was for the building the road.

Q. This matter was conversed over?

A. I do not recollect it; I do not think it was.

Q. Was this matter talked over?

A. That was conversed upon between my father and Mr. Wilkinson?

Q. Your sole object was to examine the land?

A. Yes, sir.

By Mr. Umlauf:

Q. What was your sole object?

A. That was my only and sole object; I come from New York for that purpose only.

Q. You are not deputized or requested by your father to inquire into other matters?

A. No, sir.

Q. Were you present when your father and Mr. Wilkinson made the arrangements?

A. No, sir.

Q. Were you present at any time when your father and Mr. Wilkinson had any conversation on that topic?

A. No, sir.

By Mr. De Wolf:

Q. You say that he did have conversation in regard to the matter of the mortgages some time previous to your taking the mortgages?

A. Yes, sir.

256 Q. Your father knew what these notes and mortgages were given for?

A. He told me from information he received from Mr. Wilkinson before I come west.

The plaintiff offered the depositions of George Wilkinson and Tunis Cooper:

257 United States of America, northern district of Illinois, in the United States circuit court thereof.

TUNIS COOPER
vs.
JACOB LABER. } Action of assumpsit.

UNITED STATES OF AMERICA,
State of New York, Dutchess county, ss:

The deposition of George Wilkinson, of the city of Poughkeepsie, county and State aforesaid, taken de bene esse by and before
258 me, Robert N. Palmer, a notary public, duly appointed and commissioned by the governor of the State of New York, in and for the said county of Dutchess, said witness being produced before me by the above named plaintiff, and said witness being by me first carefully examined, cautioned, and sworn to testify in the above action to the truth, the whole truth, and nothing but the truth, says:

Question. Where do you reside; what is your age, and what is your occupation?

Answer. I reside in the city of Poughkeepsie; am sixty-one years of age, and am a merchant by occupation.

Question. Do you know the plaintiff and defendant in this suit?

Answer. I know Tunis Cooper, and have known him for ten or fifteen years, and my impression is that I have seen the defendant.

Question. What was your business and position, public or private, in 1856?

Answer. I was engaged in mercantile business, and was then mayor of the city of Poughkeepsie.

Question. Was you, in the year 1856, the agent of the
259 Racine and Mississippi Railroad Company for the purpose of selling and disposing of the securities held by the Railroad Company, and receiving the money for the sale of the same for the said company?

Answer. I was.

Question. When were you appointed, and how long did you act as such agent?

Answer. Sometime in the year 1854, and acted until sometime in the year 1858.

Question. As such agent did you sell to the plaintiff the note now shown to you, and marked Exhibit No. 1?

Answer. The sale and transfer of this note was made by myself and Marshall M. Strong, the attorney and director of the said company, to Tunis Cooper, through his son Fletcher Cooper, who acted for him.

Question. What was the amount paid by the plaintiff for the note marked Exhibit No. 1?

Answer. Whole principal of note was paid, and interest adjusted to the date of transaction.

Question. To whom was the money paid?

Answer. It was paid to Marshall M. Strong, the attorney and director of the said company, by Fletcher Cooper, for his
260 father, the plaintiff, in drafts drawn upon some bank or party in New York.

Question. Where did this transaction take place?

. It took place in Stevenson county, Illinois, at a locality called Davis's store, and parties present were myself, Fletcher Cooper, Marshall M. Strong, and others parties whom I do not now recollect.

Question. Did you in company with Fletcher Cooper, before this note marked Exhibit No. 1 was disposed of, as above stated, go to the premises mentioned in the mortgage accompanying this note, marked Exhibit No. 1, for the purpose of ascertaining the safety of the mortgage security collateral to this note?

Answer. I did.

Question. Did you then and there see the defendant?

Answer. My impression and best recollection is, that I did.

Question. Did he, the defendant, know the object of your visit to his place?

Answer. My best recollection is that he did.

Question. Who was the president of the Racine and Mississippi Railroad Company, during the time you acted as its agent?

Ans. Henry S. Durand of Racine, Wisconsin.

261 Question. Did he, as such president, during the time you were agent, sell, transfer, and negotiate large quantities of securities of the nature or character of this security or note in action? And if yea, where his acts and doings in thus selling, transferring, and disposing of such securities known to, and sanctioned by, the board of directors of said company?

Answer. They were, he did sell large quantities of securities of this character, and directed myself and others to sell; among which directed to be sold, was this note in suit, and which acts of his own, and those done by me, by his direction, were sanctioned by the board of directors.

Question. Were the sales of the securities mentioned, including note in suit, open, fair, and in good faith, so far as the company were concerned, and so far as the purchases of such securities were concerned?

Answer. So far as my own personal transactions for the company was concerned, they were; and so far as the transactions of the officers of the company were concerned they were, to the best
262 of my knowledge and belief, fair and open.

Question. At the time you negotiated this note, marked Exhibit No. 1, did you know, or had you heard, or did you suspect, that the Racine and Mississippi Railroad Company had by its officers or agents or otherwise, used any fraud, circumvention, deceit, or falsehood, either in word or act, to or with the maker of this note to procure or obtain the making, executing, or delivering of said note by said maker to the said railroad company?

Answer. I neither knew nor heard or suspected anything of the kind, and on the contrary believe the transaction between the maker of the note and the railroad company was in all respects fair, bona fide, and in perfect good faith.

Question. During the time you were the agent of the company did you pass frequently through the country where this railroad was proposed to be built, and did you see numbers of the persons against whom the railroad company held this and like securities? and if yea, did you hear during said time any complaints proceeding from
263 the parties who gave the securities, or from any other quarter, that any fraud, circumvention, or misrepresentation had been used by the railroad company, its officers or agents, to induce the giving of this note or of any of the securities of the like character?

Answer. Did pass through a portion of the country through which this railroad was to be built, and had interviews with several individuals who had given their notes and mortgages to the company, and heard no complaint, to the best of my recollection, of any fraud, circumvention, or misrepresentation.

Question. Do you know the handwriting of Henry S. Durand?

Answer. Yes; I have seen him write and am acquainted with his handwriting.

Question. Look at the endorsement on the back of note marked Exhibit No. 1, and say whether that endorsement is in the proper handwriting of Henry S. Durand, the president of the Racine and Mississippi Railroad Company.

Answer. I have no doubt but that it is in his handwriting.

264 Question. What is the occupation of the plaintiff, and what has it always been?

Answer. A farmer, as long as I have known him.

Question. Was this money, as you understood it, invested by the plaintiff as a permanent investment.

Answer. I understood and believed it to be so.

Question. Would you consider it safe for Mr. Cooper, at his time of life, and with his infirmities, to go to Chicago to attend the trial of this action in which he is plaintiff.

Answer. It would be hazardous for him to go.

Question. At the time Mr. Cooper invested his money in this security, was he a stranger to all the transactions between the original makers of the note and the said railroad company?

Answer. So far as I have any knowledge of the matter he was, and I first introduced to him the subject of investing his money in such security.

GEO. WILKINSON.

Subscribed and sworn to before me, this 22d day of February, A. D. 1866.

ROBERT N. PALMER,
Notary Public in and for Dutchess County, N. Y.

265 UNITED STATES OF AMERICA,
Northern district of Illinois:

In the United States circuit court thereof.

TUNIS COOPER
vs.
JACOB LABER. } Action of assumpsit.

UNITED STATES OF AMERICA,
State of New York, Dutchess county, ss:

The deposition of Tunis Cooper, of the town of Fishkill, county and State aforesaid.

The plaintiff in the above action, taken de bene esse by and before me, Robert O. Palmer, a notary public duly appointed and commissioned by the Governor of the State of New York, in and for the said county of Dutchess, and said plaintiff being by me first carefully examined, cautioned, and sworn to testify in the above action to the truth, the whole truth, and nothing but the truth, says:

266 Question. Are you the plaintiff in this action?

Answer. I am.

Question. What is your age and occupation and residence?

Answer. I am in my seventy-ninth year; have always been a farmer, and reside in the town of Fishkill.

Question. Does your extreme age and state of your health render it dangerous and unsafe for you to go to Chicago to attend as a witness on the trial of this action or as a party?

Answer. Yes, I think it would. My infirmities and age would not warrant such an undertaking.

Question. Look at that note and state whether you are the owner of it.

Answer. I am the owner of this note marked Exhibit No. 1. I obtained it of the Racine and Mississippi Railroad Company by my son Fletcher, who was my agent in the transaction in which I became the owner of this note.

Question. How much did you pay for it?

Answer. I paid for it the amount specified in the note; the interest commenced running in my favor from the time I purchased

267 the note; or in other words, I paid par for it.

Question. Who applied to you to invest money in this note and mortgage?

Answer. George Wilkinson, the agent of the Racine and Mississippi Railroad Company.

Question. What passed between you and him prior to your taking the transfer of this note and mortgage accompanying?

Answer. I said to him that I would send my son Fletcher Cooper out there to examine the property, and if he was satisfied with the security, I would advance the money through him and take a transfer of the note and mortgage, and I furnished my son with money to take this and some other securities, if he should find all things satisfactory and safe. We went, and met Mr. Wilkinson in Illinois, and

went with him to the farm of the defendant Laber; found the security ample, advanced the money, and took a transfer of the securities to me. What he did after he left me to go and attend to this business, I state upon information derived from him.

Question. At the time you talked with Mr. Wilkinson about
268 investing money in this note and these securities, and during all the time of your advancing the money and taking the transfer down to and after the endorsement of the note by H. S. Durand, president, did you know or had you been informed by any person whomsoever that the Racine and Mississippi Railroad Company, officers or agents, had used any fraud, circumvention, deceit, misrepresentation, or falsehood in obtaining the execution or making of said note or inducing the said defendant to make and deliver to them the said note.

Answer. No. I never heard any suggestion from any quarter that there could be or was any objection to the validity of said note, or the bona fide nature of the transaction between the railroad company and the defendant, the giver of the note. When I took the note and advanced the money through my agent as aforesaid, I did it without notice or knowledge, actual or hearsay, of anything wrong on the part of the railroad company, its officers or agents, in obtaining it,
269 and with a full confidence and belief that it was a good, valuable and bona fide security. The note was endorsed by Durand in 1859 or 1860.

Question. When did you advance the money and take a transfer of the note and mortgage?

Answer. In the summer of 1856. The note and mortgage accompanying was delivered to me by my son Fletcher upon his return, after doing the business for me, which was in the month of July, 1856, and which I now own.

Question. When was the last payment of interest made to you?

Answer. On the 10th of May, 1857.

Question. How much is now due to you for principal and interest on the note marked exhibit No. 1?

Answer. The whole principal of thirty-seven hundred dollars, with the interest thereon from the 10th day of May, 1857.

Question. State with what funds this note was purchased?

Answer. The funds I furnished Fletcher Cooper, to purchase this note marked exhibit No. 1, were in drafts drawn by Garner
270 & Co., of Wappingers Falls, of Dutchess county, on the house of Garner & Co. of New York city, payable to my order, endorsed by me, and paid upon presentation to the Racine and Mississippi Railroad Company, or its officers or agents, by Garner & Company, of New York.

TUNIS COOPER.

Subscribed and sworn to before me this 22d day of February, A. D. 1866.

ROBERT N. PALMER,
Notary Public in and for Dutchess County, N. Y.

271 *Exhibit No. 1.*

Know all men by these presents.

That I, Jacob Laber, of the town of Rock Grove, in the county of Stephenson and State of Illinois, being justly indebted to the Racine and Mississippi Railroad Company, in the sum of thirty-seven hundred dollars, for value received, do hereby promise to pay the said Racine and Mississippi Railroad Company, or order, the sum of thirty-seven hundred dollars, at the expiration of five years from the tenth day of May, A. D. 1856, together with interest thereon at the rate of ten per cent. per annum, payable annually on the 10th day of May, in each year after the date hereof, principal and interest payable at the office of said company in the city of Racine, in the State of Wisconsin.

In witness whereof, I have have hereunto set my hand this sixth day of May in the year of our Lord one thousand eight hundred and fifty-six.

JACOB LABER.

Endorsed: Exhibit No. 1, R. H. Palmer, Notary Public.

Also endorsed: "Pay to Tunis Cooper, Racine and Mississippi Railroad Co., by H. S. Durand, Pres't. Interest paid to May 10, 1857. Anount due $6,670."

272 Samuel J. Davis, being recalled by defendant, was examined in chief by Mr. DeWolf, and testified as follows:

Q. You will state to the court and jury whether you went with Mr. Cooper, or who was with you on that day that you examined these lands, and what took place, and how many mortgages you had, and to the best of your recollection whether you saw any other parties.

A. Mr. Strong, and Mr. Cooper, and myself, and some other men; I do not remember who it was, it might have been Mr. Wilkinson. My recollection of seeing Mr. Wilkinson is he came on to buy some clover seed.

Q. Where did you start from?

A. From our store.

Q. Go on and state who you saw that day?

A. I do not recollect of conversing with any one but Mr. McElhoney, who was ploughing on his farm along the road.

Q. He was living then on his farm?

A. Yes, sir.

Q. Was there any other person?

A. I do not think there was any other person who had given mortgages; frequently saw people and met people.

Q. You do not recollect anything but simply passing by this farm?

273 A. Passing by the farm, if my memory serves me right, Mr. Strong gave me some of his pamphlets, and showed them to the different parties.

Q. Are you acquainted with the parties?
A. Yes, sir; I have been since '38.
Q. What is your recollection about seeing Mr. Laber?
A. My recollection is that I have seen noboddy but Mr. McElhiney.

By Mr. Umlaf:

Q. You might have seen Mr. Laber?
A. I probably might, but my recollection is that I did not.

(The several acts of the legislature of Illinois, and of the legislature of Wisconsin, touching the various roads and corporations, were read and referred to by the counsel on both sides.)

274 And the said cause was to the said jury argued by counsel, as well upon the part of the said defendant as of the said plaintiff; and the counsel for the said defendant then and there contended that the plaintiff could not recover upon the promissory note which had been read in evidence, if the jury believed from the evidence that the same was made and given by the defendant to the Racine and Mississippi Railroad Company, as alleged by the plaintiff in his declaration; and they, also, from the evidence believed that said promissory note was so made and given for the purpose of aiding said railroad company in the construction of a railroad in the State of Illinois, and that the plaintiff knew, or was informed, that said note was given for that purpose at or prior to the time when he purchased the same; and said counsel asked the court to so charge the jury; but the court refused to so charge the said jury; to which refusal of the court to so charge the jury the defendant, by his counsel aforesaid, did then and there except.

And thereupon the court charged the said jury as follows; that is to say:

275 This is an action brought against the defendant by the plaintiff as the endorsee of a promissory note given by the defendant on the 6th day of May, 1856, for the sum of thirty-seven hundred dollars, to the Racine and Mississippi Railroad Company, and payable, with the ten per cent. interest, at the office of the company in Racine, Wisconsin, on the tenth day of May, 1861.

It is necessary that you should understand clearly the circumstances under which this note was given. By acts of the legislatures of Illinois and Wisconsin certain corporations were authorized to construct a railroad from Racine, partly through Wisconsin, and partly through Illinois, to the Mississippi river at Savannah, and to consolidate these roads with each other, so as to make one continuous line of road. Articles of association were entered into to accomplish that purpose. After this was done the company sought to raise money by obtaining subscriptions to the stock of the road from different parties along the line, and took from them notes similar in character to the one that is in evidence here, and to secure their payment mortgages were given on real estate. Accordingly,

276 to secure the payment of this note, the defendant executed a mortgage on his farm. At the time this note and mortgage were given, the Racine and Mississippi Railroad Company entered

into an agreement with the defendant to the effect that, in consideration that the defendant assigned to the company his right to any dividend that he might be entitled to on his stock, the company would save him harmless from the payment of interest, and from any loss whatever for his subscription to the stock.

On the 29th day of May, 1856, the railroad company executed a bond, with coupons attached; and in June of that year this bond, together with the note and mortgage, were assigned to the plaintiff, he paying the amount of the note. The bond recited that the company was indebted to the bearer in the sum of thirty-seven hundred dollars, payable at its office in the city of New York, on the 10th of May, 1861, with interest from and after the tenth of May, 1856, at the rate of ten per cent., payable semi-annually, and that, as security for the same, it was assigned and transferred to the holder of the bond,
the note and mortgage of the defendant. The note, unen-
277 dorsed, and mortgage and bond were fastened together, and
delivered to the plaintiff's son and agent, Fletcher Cooper, at the time the money was paid.

There is evidence tending to show that certain representations were made at the time by parties who procured the note and mortgage from the defendant, and which, it is said, caused him to execute them; and there has been, also, a good deal of evidence introduced, the object of which, on the part of the defendant, is to show that these representations were untrue, and therefore it is claimed the defendant was not bound to pay the note and mortgage.

The only remark the court desires to make in relation to that, is this: It is necessary for you to distinguish between statements made by way of expressing an opinion, or a simple recommendation, and statements that were made by parties with a view of inducing the defendant to execute the note. A mere expression of opinion, or a recommendation in relation to certain things, of course, should be regarded merely as the judgment of the party. A statement of the facts which the defendant would not be presumed to know, and had
not the means of knowing, with a view of inducing him to
278 execute the note would be different.

The court will leave it to you to determine whether there were representations made as facts to the defendant, with a view to induce him to execute the note and mortgage, which were false.

If you should find that those statements were made and were untrue, the next question would be whether they would affect the plaintiff.

It was in June, 1856, that the note and mortgage were transferred to the plaintiff.

You have to take the state of facts as they existed at that time in order to ascertain the bona fide character of the assignment.

Whatever might occur afterwards could not affect the plaintiff. It is made a question how far the facts, at the time, bound the plaintiff. I apprehend there can be no doubt, from the evidence in the case, that the plaintiff knew for what purpose the note and mortgage were given; that they were given as a subscription for so many hares of the capital stock of the company.

The main question is, whether the plaintiff knew of the existence of the representations alleged to be made at the time or prior
279 to the execution of the note, and also knew that they were untrue.

Is there evidence in the case that tends to show that the plaintiff, or his son, Fletcher Cooper, at the time the bond, note, and mortgage were taken knew, or had reason to know, that there was any false or fraudulent representations made to the defendant, to induce him to execute them? If there is not any such evidence, then, according to the view which the court takes, the plaintiff would be, as to that, a bona fide holder of the note and mortgage, and would not be bound by any equities which might exist between the railroad company and the defendant.

The defendant's counsel has contended that the note and mortgage were invalid, for the reason that the articles of consolidation were void; that there was, in reality, no foundation in law for the note and mortgage to rest upon, and some authorities have been cited on this point. I have not had as much time as I would desire to consider this question.

The main ground upon which he puts it, as I understand it, is, that the articles of association between the different corpora-
280 tions were not under seal, and therefore the union of the roads in the two States was illegal. As I am at present advised, I am inclined to think, in the form in which the question arises, there was authority on the part of the railroad company to become the payees of the note; and, consequently, this note and mortgage we must so far treat as valid.

I shall leave the question in such a *a* way as to enable the defendant to avail himself of the points of law, and give it further consideration, if it shall become necessary.

I have spoken of the alleged misrepresentations that were made at the time, and of the necessity of the plaintiff, or his agent, knowing that these misrepresentaions were made, before that part of the defence can be made out. I will now particularly call your attention to the fact that, at the time the note and mortgage were given, the railroad company executed a written agreement with the defendant. There is no doubt that the note and mortgage and the agreement were all one transaction.

The question is, was the plaintiff, at the time of the transfer to him, aware of this agreement? Did he know the nature and
281 contents of that contract? If he did, then he was bound by it, and not otherwise.

You will see that the agreement by its terms seems to contemplate that the note and mortgage were to be transferred, because in the case of transfer the company guarantees the defendant against loss. The view that I take of it is that unless the plaintiff or his son knew of this agreement that was made by the company he is not bound by it.

The only remaining question is whether there was an endorsement or assignment of the note to the plaintiff.

The evidence shows that the Racine and Mississippi Railroad Company appointed agents to negotiate and dispose of these notes and mortgages, and by virtue of the authority so given, as I understand, this and similar bonds were executed by the company, which were secured collaterally, as in this case, by notes and mortgages. As I have stated, the note was not at the time literally endorsed by the company. By the terms of the bond they transferred and assigned the note; but there is a clause in the bond that declares that the note and mortgage were assigned and transferred in connection
282 with the bond, and not otherwise. So that I think it was the intention of the company that the bond, the note, and the mortgage should all go together, forming one security to the holder or bearer. They were all attached together and transferred at the same time to the plaintiff. There may be a question whether this was not legally a good endorsement of the note by the payee, the Racine and Mississippi Railroad Company.

It is true, the endorsement was not then written on the back of the note, but it was written upon a paper which was attached to it and which it was intended should become a part of it. However that may be, there was a written endorsement made afterwards, and years before its maturity, upon the note by the president of the company to the plaintiff. Some question has been made whether this endorsement was authorized. You have heard the testimony of Mr. Durand, the president, on that subject.

There is no doubt that it was the intention of the company to transfer whatever right of property it had in the note to the plaintiff at the time that the money was received and the negotiation consummated. Therefore, the written endorsement upon the
283 note which was subsequently made was only carrying out the intention of the parties at the time. He says that it was the subject of conversation in the board of directors; that endorsements were made by him from time to time in the presence and with the knowledge of the board; and he gives the reason why.

It was supposed that under the law of Illinois a written endorsement on the note itself was necessary. It was thought, he says, by the board that no additional authority was necessary to enable him to make the indorsement, and it was made accordingly.

If you believe this, in contradiction of another witness who says that there was a resolution introduced, no record of which was made, giving authority, and it was voted down, then I think there is no doubt that there was a valid technical endorsement made on the note, because, if his statement is true, it was done with the knowledge and consent of the board of directors, and in fact it would have been a breach of faith for the board of directors to withhold the endorsement from the note, if that were necessary, because they had transferred the note, they had got value for it in cash, and it was
284 right that they should give to the plaintiff all the power and control over the note which they themselves had.

You will perceive, therefore, that according to the view which the court takes in this case the plaintiff was a *bona fide* holder of the

note and can recover if he did not know that there were any false or fraudulent representations made at the time or previous to its execution, and which caused its execution; and if he did not know of the existence of the contract or agreement given by the railroad company at the time that it was executed, and if he paid value for it. The reason of this is apparent, as I think. It is said to be a hard case for the defendant, as the stock has become worthless, that he should pay his money for nothing. That may be true, but the question is, who should suffer a loss in such a case? Admitting that he has been imposed upon, and as between the original parties themselves, he ought not to pay it; still if he or the plaintiff has to suffer the rule is in the case supposed that by executing the note and enabling the the company to put it in circulation and raise money on it the defendant must suffer the loss, for if he had never executed the note
285 nor caused it to be put in circulation the plaintiff never would have advanced his money on it. That is the reason of the rule of law on the subject, and it is founded, it seems to me, on the plainest principles of justice and equity. So that you will see the case turns, so far as you are concerned upon this, to wit, whether there is any evidence in the case which shows that the plaintiff knew that there were misrepresentations made (if there were misrepresentations of the character that I have stated) and whether the plaintiff knew of the existence of the agreement that was made at the time by the railroad. If he did not, and if there was no fact brought to his knowledge which would cause a prudent man to make inquiry, then I think that the plaintiff is entitled to recover. If, however, he knew of the existence of any fraud, if he knew of this contract and its terms, then he is not a bona fide purchaser without notice, but he takes the note and mortgage subject to the equities which exist between the parties, and the defendant would not be liable. The other questions raised by the defendant I shall reserve for future consideration, if it becomes necessary. This is the view I now take of the law generally.

286 If you shall find for the plaintiff, of course he is entitled to recover the amount of the note, with interest from the last payment, which was the tenth of May, 1857.

And the counsel for the said defendant did then and there except to so much and to such parts of the said charge as are contained in the words following, that is to say: "A mere expression of opinion or a recommendation in relation to certain things that of course should be regarded merely as the judgment of the party."

And the counsel for the said defendant did then and there further except to so much and to such parts of the said charge as are contained in the words following, that is to say: "The main question is whether the plaintiff knew of the existence of the representations alleged to be made at the time or prior to the taking of the note, and also knew that they were untrue."

And the counsel for the said defendant did then and there further except to so much and to such parts of the said charge as
287 are contained in the words following, that is to say:

"Is there evidence in the case that tends to show that the plaintiff, or his son, Fletcher Cooper, at the time the bond, note, and mortgage were taken, knew, or had reason to know, that there was any false or fraudulent representations made to the defendant to induce him to execute them? If there is not any such evidence, then, according to the view which the court takes, the plaintiff would be as to that a bona fide holder of the note and mortgage, and would not be bound by any equities which might exist between the railroad company and the defendant."

And the counsel for the said defendant did then and there further except to so much, and to such parts of the said charge as are contained in the following words, that is to say:

"As I am at present advised, I am inclined to think, in the form in which the question arises, there was authority on the part of the railroad company to become payees of the note, and, consequently, this note and mortgage, we must so far treat as valid."

288 And the said counsel for the said defendant did then and there further except to so much and to such parts of the said charge as are contained in the words following, that is to say:

"The question is, was the plaintiff at the time of the transfer to him aware of this agreement? Did he know the nature and contents of that contract? If he did, then he was bound by it, and not otherwise?"

And the counsel for the said defendant did then and there further except to so much, and to such parts of the said charge as are contained in the words following, that is to say:

"The view that I take of it is, that unless the plaintiff or his son knew of this agreement that was made by the company, he is not bound by it."

And the counsel for the said defendant did then and there further except to so much and to such parts of the said charge as are contained in the words following, that is to say:

"There may be a question whether this was not legally a
289 good endorsement of the note by the payee, the Racine and Mississippi Railroad Company. It is true, the endorsement was not written on the back of the note, but it was written upon a paper which was attached to it, and which it was intended should become a part of it.

"If you believe this, in contradiction of another witness, who says that there was a resolution introduced, no record of which was made, giving authority, and it was voted down, then I think there is no doubt that there was a valid technical endorsement made on the note, because if his statement is true, it was done with the knowledge and consent of the board of directors; and, in fact, it would have been a breach of faith for the board of directors to withhold the endorsement from the note, if that were necessary, because they had transferred the note, they had got value for it in cash, and it was right that they should give to the plaintiff all the power and control over the note which they themselves had."

And the counsel for the said defendant did then and there

290 further except to so much and to such parts of the said charge as are contained in the words following, that is to say:

"You will perceive, therefore, that, according to the view which the court takes in the case, the plaintiff was a bona fide holder of the note, and can recover, if he did not know that there were any false or fraudulent representations made at the time, or previous to its execution, and which caused its execution, and if he did not know of the existence of the contract, or agreement given by the railroad company at the time that it was executed, and if he paid value for it. The reason of this is apparent, as I think."

And the counsel for the said defendant did then and there further except to so much and to such parts of the said charge as are contained in the words following, that is to say:

"Admitting that he has been imposed upon, and as between the original parties themselves he ought not to pay it, still if he or the plaintiff has to suffer, the rule is, in the case supposed, that by executing the note and enabling the company to put it in circu-

291 lation and raise money on it, the defendant must suffer the loss, for if he had never executed the note, nor caused it to be put in circulation, the plaintiff never would have advanced his money on it."

And the counsel for the said defendant did then and there further except to so much and to such parts of the said charge as are contained in the words following, that is to say:

"So that you will see the case turns, so far as you are concerned, upon this, to wit: Whether there is any evidence in the case which shows that the plaintiff knew that there were misrepresentations made, (if there were misrepresentations of the character that I have stated,) and whether the plaintiff knew of the existence of the agreement that was made at the time by the railroad.

"If he did not, and if there was no fact brought to his knowledge which would cause a prudent man to make inquiry, then I think that the plaintiff is entitled to recover."

292 And upon the evidence aforesaid, and none other, and the aforesaid charge of the court, and none other, the said cause was submitted to the said jury, who rendered the *the* verdict for the plaintiff of which mention is within made.

And therefore, after verdict and before judgment, the said defendant, by his aforesaid attorney, moved the court to set aside the said verdict and grant a new trial, for the reason that the court had charged the jury as it did, and to which, as aforesaid, the said defendant had excepted, and upon the grounds or questions which the court reserved, and for the reason that the court aforesaid should have charged the said jury that they should return a verdict for the defendant, if they believed from the evidence that the promissory note, which had been read in evidence, was made and given by the defendant to the Racine and Mississippi Railroad Company, as alleged in the said plaintiff's declaration, and also believed that the same was so given for the purpose of aiding said railroad company in the construction of a railroad in the State of Illinois, and also believed

293 from the evidence that the plaintiff knew, or was informed that said note was given to said company for such purpose, at or prior to the time when he purchased the same; and also for the reason that the Racine and Mississippi Railroad Company, of Wisconsin, acquired no right or power to locate and construct a railroad in the State of Illinois, under or by virtue of the consolidation contracts which had been read in evidence, or by virtue of either of them; and also for the reason that the promissory note, which had been read in evidence, was made and given to the Racine and Mississippi Railroad Company, of the State of Illinois, and which said motion was, at the last aforesaid term, argued by counsel, and the same was by said court overruled.

To which decision of the said court the defendant, by his attorney, aforesaid, did then and there except; and because now of the matters aforesaid appear by the record of the cause aforesaid, therefore, on the prayer of the said defendant, by his said counsel, the said judge hath, to this bill of exceptions, set his seal, according to the statute
294 and the practice of said court, made and provided, and the same made a part of the said record this day of , in the year of our Lord eighteen hundred and sixty-six.

THOMAS DRUMMOND. [L. S.]

Endorsed: Filed Nov. 26th, 1866.

WM. H. BRADLEY, *Cl'k.*

295 On this day, to wit, the 6th day of December, A. D. 1866, came said defendant, by his attorney, and filed in said clerk's office his appeal bond in said entitled cause; which said bond is in the words and figures following, to wit:

Appeal bond.

UNITED STATES OF AMERICA, *Northern district of Illinois, ss:*

Circuit court of the United States for the eighth circuit and northern district of Illinois.

TUNIS COOPER *vs.* JACOB LABOR. } In error.

Know all men by these presents, that we, Jacob Labor, of Davis, as also Lewis Labor, in the county of Stephenson and State of Illinois, and James H. Knowlton, of Chicago, county of Cook and State of Illinois, are held and firmly bound unto the above named Tunis Cooper, in the sum of ten thousand dollars lawful money of the United States, to be paid to the said Tunis Cooper, his executors, or administrators, to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our
296 and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals, and dated this third day of December, A. D. 1866.

Whereas, the above named Jacob Labor hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled cause by the circuit court of the United States for the eighth circuit and northern district of Illinois. Now, therefore, the condition of this obligation is such, that if the above named Jacob Labor shall prosecute his said writ of error to effect, and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

JACOB LABOR. [SEAL.]
JAMES H. KNOWLTON. [SEAL.]
LEWIS LABER.

Sealed and delivered in the presence of—

STATE OF ILLINOIS, *Cook county, ss:*

297 I, James H. Knowlton, being first duly sworn on oath, depose and say, that I am one of the sureties who signed the foregoing bond, and that I am a freeholder in the said State of Illinois, and that I am worth the sum of ten thousand dollars over and above all debts and legal liabilities and exemptions, and further say not.

J. H. KNOWLTON.

Subscribed and sworn to before me this 3d day of December, A. D. 1866.

WM. H. BRADLEY, *Clerk.*

Approved: THOMAS DRUMMOND.
Endorsed: Filed Dec'b. 6th, 1866.
WM. H. BRADLEY, *C'lk.*

298 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, Wm. H. Bradley, clerk of the circuit court of the United States within and for said northern district of Illinois, do hereby certify the foregoing transcript, from pages one (1) to two hundred and ninety-seven, inclusive, together with the printed matter therein secured and referred to in said transcript, contains a true, full, and perfect copy from the record and files of all the proceedings had in said court in said cause of Tunis Cooper against Jacob Laber, as the original of the same now remains in my custody, and that the writ of error and citation sued out in said cause by the plaintiff in error are hereto appended.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said northern district, this twenty-seventh day of December, A. D. 1866.

[SEAL] WM. H. BRADLEY, *Clerk.*

299 Circuit court of the United States, northern district of Illinois.

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea, which is in the said court before you, between Tunis Cooper, plaintiff, and Jacob Laber, defendant, a manifest error hath happened to the great damage of the said Jacob Laber, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the
300 said Supreme Court, to be then and there held, that the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness, the hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this twenty-seventh day of November, in the year of our Lord one thousand eight hundred and sixty-six, and of our independence the ninety-first year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

301 UNITED STATES OF AMERICA, *ss:*

To Tunis Cooper, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday in December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Jacob Laber is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the honorable Thomas Drummond, one of the judges of the circuit court of the United States for the northern district of Illinois, this twenty-seventh day of November, in the year of our Lord eighteen hundred and sixty-six.

THOMAS DRUMMOND.

301½ I admit that the within citation was served upon me this twenty-second day of December, A. D. 1866, as required by the rules and practice of the Supreme Court of the United States and the laws upon that subject.

LEWIS UMLAUF,
Attorney for Tunis Cooper, Defendant in Error.

302 United States of America, Supreme Court, December term 1866.

JACOB LABER, plaintiff in error
vs.
TUNIS COOPER, defendant in error.

And afterwards, to wit, on the first day of January, A. D. 1857, in the year of our Lord eighteen hundred and sixty-seven, in the same term before the justices of the Supreme Court of the United States, comes Jacob Laber by Matt. H. Carpenter, his attorney, and says, that in the record and proceedings aforesaid and also in giving judgment aforesaid there is manifest error in this, to wit:

1st. In the admission of the testimony of H. S. Durand, upon the subject of assigning of the note in question and similar notes. His authority to sell and to assign was not merely as president, but as financial agent appointed by the board of directors, and that authority was in writing, such instrument, order, or resolution of the board was the best evidence, and should have been produced by the plaintiff.

2d. The admission of H. S. Durand's testimony as to the conversation and knowledge of individual members of the board of directors of said railroad company respecting his (Durand's) assignment of the note in question, and of similar notes, by an assignment upon the back of the note. His authority to assign this note, and the manner in which this and similar notes were to be and were assigned had already been determined by the board of directors. This mode was by attaching the bond of the company to the note and mortgage of the party. Having thus officially determined this question, the mere fact this, one or all of the directors individually had

303 knowledge that Mr. Durand, without further authority, was otherwise assigning this and similar notes and the supposition that his power as financial agent to sell note would give him such authority would not vary that authority, and the court erred in permitting this testimony to be given.

304 There is also error in this, to wit, the said circuit court of the United States for the northern district of Illinois erred in not charging the jury "that the plaintiff could not recover upon the promissory note which had been read in evidence, if the jury believed from the evidence, that the same was made, and given by the defendant to the Racine and Mississippi Railroad company as alleged by the plaintiff in his declaration, and they also, from the evidence, believed that said promisory note was so made, and given for the purpose of aiding said railroad company in the construction of a railroad in the State of Illinois, and that the plaintiff knew or was informed that said note was given for that purpose at or prior to the time when he purchased the same."

There is also error in this, to wit, the said circuit court erred in charging the jury that "a mere expression of opinion or a recommendation in relation to certain things, that of course should be regarded merely as the judgment of the party."

There is also error in this, to wit, the said circuit court erred in charging the jury that "the main question is, whether the plaintiff knew of the existence of the representations alleged to be made at the time or prior to the taking of the note and also knew that they were untrue."

There is also error in this, to wit, the said circuit court erred in charging the jury that "is there evidence in the case that tends to show that the plaintiff, or his son, Fletcher Cooper, at the time the bond, note, and mortgage were taken, knew or had reason to know that there was any false or fraudulent representations made to the defendant to induce him to execute them? if there is not any such evidence, then, according to the view which the court takes, the plaintiff would be as to that a bona fide holder of the note and mortgage, and would not be bound by any equities which might exist between the railroad company and the defendant."

305 There is also error in this, to wit, the said circuit court erred in charging the jury that "as I am at present advised, I am inclined to think in the form in which the question arises, there was authority on the part of the railroad company to become payees of the note, and consequently this note and mortgage we must so far treat as valid."

There is also error in this, to wit, the said circuit court erred in charging the jury that "the question is was the plaintiff at the time of the transfer to him aware of this agreement; (to indemnify against all loss;) did he know the nature and contents of that contract; if he did then he was bound by it; and not otherwise."

There is also error in this, to wit, the said circuit court erred in charging the jury that "the view that I take of it is, that unless the plaintiff, or his son, knew of this agreement that was made by the company he is not bound by it."

There is also error in this, to wit, the said circuit court erred in charging the jury that "there may be a question whether this was not legally a good endorsement of the note by the payee, the Racine and Mississippi Railroad Company. It is true the endorsement was not written on the back of the note, but it was written upon a paper which was attached to it, and which it was intended should become a part of it. If you believe this, in contradiction of another witness who says that there was a resolution introduced, no record of which was made, giving the authority, and it was voted down, then I think there is no doubt that there was a valid technical endorsement made on the note, because if his (Durand's) statement is true, it was done with the knowledge and consent of the board of directors, and in fact it would have been a breach of faith for the board of

306 directors to withhold the endorsement from the note, if that were necessary, because they had transferred the note, they had got value for it in cash, and it was right that they should give to the plaintiff all the power and control over the note which they themselves had."

There is also error in this, to wit, the said circuit court erred in charging the jury that "you will perceive, therefore, that according

to the view which the court takes in the case the plaintiff was a bona fide holder of the note, and can recover if he did not know that there were any false or fraudulent representations made at the time, or previous to its execution, and which caused its execution, and if he did not know of the existence of the contract, or agreement given by the railroad company at the time that it was executed, and if he paid value for it. The reason of this is apparent as I think."

There is also error in this, to wit, the said circuit court erred in charging the jury that "admitting that he has been imposed upon and as between the original parties themselves he ought not to pay it, still if he or the plaintiff has to suffer, the rule is, in the case supposed, that by executing the note and enabling the company to put it into circulation and raise money on it, the defendant must suffer the loss, for if he had never executed the note, nor caused it to be put into circulation, the plaintiff never would have advanced his money on it."

There is also error in this, to wit, the said circuit court erred in charging the jury that "so that you will see the case turns, so far as you are concerned upon this, to wit, whether there is any evidence in the case which shows that the plaintiff knew that there were misrepresentations made, (if there were misrepresentations of the character that I have stated,) and whether the plaintiff knew of
307 the existence of the agreement that was made at the time by the railroad. If he did not, and if there was no fact brought to his knowledge which would cause a prudent man to make enquiry, then I think that the plaintiff is entitled to recover."

308 There is also error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said Tunis Cooper, against the said Jacob Laber; whereas, by the law of the land the said judgment ought to have been given for the said Jacob Laber against the said Tunis Cooper, and the said Jacob Laber prays that the judgment aforesaid for the errors aforesaid, and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that he may be restored to all things which he hath lost by occasion of the said judgment, &c.

MATT. H. CARPENTER,
Att'y for Jacob Laber.

Supreme Court of the United

DECEMBER TERM, A. D. 1867.

JACOB LABER, - - PLAINTIFF IN ERROR,

vs.

TUNIS COOPER, DEFENDANT IN ERROR.

ARGUMENT OF J. H. KNOWLTON,

Of Counsel for Plaintiff in Error.

Beach & Barnard, Brief Printers, 122 & 124 Clark St., Chicago.

IN THE

SUPREME COURT

OF THE

UNITED STATES,

DECEMBER TERM, A. D. 1867.

JACOB LABER, - - PLAINTIFF IN ERROR,

VS.

TUNIS COOPER, DEFENDANT IN ERROR.

ARGUMENT OF J. H. KNOWLTON,
Of Counsel for Plaintiff in Error.

CHICAGO:
BEACH & BARNARD, STEAM PRINTERS.
1867.

STATEMENT.

This was an action of assumpsit upon a promissory note made by Jacob Laber, and bearing date May 6th, 1856, wherein and whereby he promised to pay in five years from the 10th day of that month, to the Racine and Mississippi Railroad Company, or order, at its office in the City of Racine, in the State of Wisconsin, thirty-seven hundred dollars, and annual interest, on each 10th of May, at the rate of *ten per cent. per annum.* Tunis Cooper, the defendant in error, brought the action in his own name, as endorser of the note.

Laber, defendant below, pleaded several pleas. 1. Non-assumpsit. 2. A special amended plea, that said note was procured by the false and fraudulent representations of the payee corporation, substantially: that said corporation then had a railroad completed and running from said city of Racine, some forty miles, toward Beloit, and nearly ready for the iron all the way to Beloit, and that the same was all paid for, and that the corporation was out of debt, and did not owe a dollar, and that said company had done, and were going to do, everything upon the ready cash pay principle, and that in that way the corporation had constructed and carried on its work at very low prices, and that the corporation was then receiving from the operations of the railroad, which it then had completed, large sums of money, and sufficient to pay the stockholders thereof over *ten per cent. per annum*; and that the corporation then had subscribed to its capital stock, by responsible persons along the line of its railroad, over six hundred thousand dollars; and that it then had on hand sufficient funds to complete its railroad to Beloit, and a surplus of one hundred and thirty-three thousand dollars, after the completion of its railroad to said Beloit; and that it had issued no bonds, and had not mortgaged any of its property, or a foot of its railroad; and that said corporation had power and authority to locate and operate a railroad from Racine, on Lake Michigan, in the

County of Racine, and State of Wisconsin, to Beloit, and from thence by way of Freeport and Mount Carrol, to Savanna, in the County of Carroll, in the State of Illinois, and that it had consolidated its capital stock with that of the Rockton and Freeport Railroad Company, and with that of the Savanna Branch Railroad Company, two railroad corporations of Illinois; and that the payee corporation wished the defendant Laber, and others in Illinois, along and in the vicinity of the said proposed railroad, in Stephenson and Carroll Counties, to take and subscribe to the capital stock of said corporation, to enable it to complete said railroad to Savanna, so that the corporation could carry away for the farmers their next crop; and that the corporation would assume and pay the interest on the notes given in payment of such subscribed stock; and that such stock could be subscribed and paid in notes secured by mortgage upon real estate in Illinois; and that all the money realized by the corporation from such notes and mortgages, should be applied to the construction of the railroad from Beloit, by way of Freeport, to said Savanna; and that the corporation authorized its agents to make these representations.

All these representations in the plea, were averred to be false, and unfounded in fact, in each particular, and it was also averred that the corporation was then, and had continued to be, insolvent, and its stock of no value, and also that the defendant, Laber, had no knowledge or information as to the facts, except the representations made to him, which he believed to be true, and so believing, subscribed to the stock, and paid the same, with the note in question, secured by mortgage upon his real estate, in said Stephenson County. The plea also averred that the corporation then had mortgaged its whole line of railroad from Racine to Beloit, with all its rolling stock, stations, and depot buildings and lands. It was further averred in the plea that at and prior to the time when the defendant in error, Cooper, became possessed of said note, he knew, and was informed, that said note had been obtained from the defendant Laber by the aforesaid false and fraudulent representations, and under the agreement with the corporation, that for said note and mortgage, it would issue to him its certificates of

full paid stock, for thirty-seven shares, and that it would pay the interest on the note, and save him harmless therefrom, and that the stock was of no value. This plea was to the first and second counts of the declaration.

3. The defendant, Laber, specially pleaded that the note mentioned in the first count of the declaration, had never been, at any time, assigned or transferred by the payee corporation, by any endorsement of said corporation upon the said promissory note, and concluded with a verification.

4. The defendant, Laber, pleaded a like plea as to the note mentioned in the second count of the declaration. These two last pleas were verified by affidavit.

The plaintiff, Cooper, did not *demur* or *reply* to either of the pleas, denying the endorsement of the note mentioned in the declaration.

To the second plea, the plaintiff below put in a replication in which he simply alleges that "he *did not* have any *knowledge or* "*information, or notice whatever of the facts averred in defend-*"*ant's said plea, as constituting the defence of failure of consider-*"*ation to the said note*, neither before nor at the time of the en-"dorsement and transfer of the said note to this plaintiff by the "payee, and before the maturity thereof." This replication concluded to the country.

On this state of pleading, the cause was tried before a jury at the adjourned October term, 1866, of the Circuit Court of the United States, for the Northern District of Illinois, before Hon. Thomas Drummond, Judge.

The trial resulted in a verdict in these words: "We, the jury, "find *the issue* for the plaintiff, and assess his damages to the sum "of seven thousand one hundred and ninety-two dollars and thir-"ty-five cents."

Judgment was entered on the verdict for the amount thereof, with costs. To reverse that judgment, this writ of error is prosecuted.

A number of exceptions were taken by the defendant below, to the charge of the court, and to a refusal to charge, as requested by the defendant. With great deference, we say, that from the record, it is apparent that the cause was tried more upon "*general principles*," than upon the points at issue between the parties.

The court, as we think, erroneously proceeded in the trial, as though all the facts set forth in defendant's *three special pleas* were put in issue by replication. This being so, the defendant could only ask instructions upon this hypothesis, and except to refusals; and so far as the charge to the jury was in the same direction, to except thereunto. These exceptions were taken, and are assigned as error, as the only chance of saving the case to the defendant.

An inspection of the record will show that the verdict and judgment are against controlling facts, which constituted a flat bar, and which were admitted by the pleadings.

The first filed special plea, is out of the case, as it was held bad on demurrer. But leave was given to file other pleas, which was done.

It is alleged, in the declaration, that the defendant Laber, is a citizen of Illinois, and that the note in question was made and delivered by him to the Racine and Mississippi Railroad Company, a corporation and body politic, created and existing by and under the laws of the State of Wisconsin.

This allegation is not controverted by plea, and hence, is conclusively admitted of record. In fact, the defendant's amended plea asserts the fact, that the note in controversy was made and delivered to this Wisconsin corporation, for the purpose of aiding it in the construction of a railroad in Illinois, and upon the statement by the agents of that corporation, that every dollar realized on that and similar notes and mortgages obtained in Illinois,

should be expended on the road therein, and that the company would pay the interest on all such notes, and save the makers harmless therefrom. The plea also avers that this Wisconsin corporation had no power or authority to locate, construct and operate a railroad in Illinois, which, to get the defendant's notes it, by agents represented, it had authority to do.

The different points on the pleadings will be considered as we proceed with the consideration of the case.

ARGUMENT.

I.

The court erred in charging the jury as follows: "*You will "perceive, therefore, that, according to the view which the court takes "in the case*, the plaintiff was a *bona fide* holder of the note, and "can recover, if he did not know that there were any false or "fraudulent representations made at the time, or previous to its "execution, and which caused its execution, and if he did not "know of the existence of the contract or agreement given by the "railroad company at the time it was executed, and if he paid "value for it. The reason of this is apparent, as I think." The following is also erroneous: "*So that you will see the case turns, "so far as you are concerned, upon this, to wit:* Whether there is "any evidence in the case which shows that the plaintiff knew "that there were misrepresentations made, (if there were misrep-"resentations of the character that I have stated,) and whether "the plaintiff knew of the existence of the agreement that was "made at the time by the railroad. If he did not, and if there "was no fact brought to his knowledge which would cause a "prudent man to make inquiry, then, I think, that the plaintiff is "entitled to recover." (Printed record, page 169.) These *parts* of the charge were excepted to by the defendant.

From the language employed, it will be seen that the court submitted to the jury *only* three facts:

1. Were false or fraudulent representations made which caused the defendants to give the note?

2. If such represensations were made, did the plaintiff know that they had been made?

3. Did the plaintiff know of the existence of the agreement given by the railroad company, (payee of the note,) at the time the note was executed?

The court says, that if the plaintiff did not know that these representations were made, and did not know of the existence of this agreement, he was entitled to recover. The great fault with these instructions is, that each proposition submitted to the jury was admitted by the pleadings, They are stated in the amended plea secondly pleaded, and are in no way put at issue by replication.

As *none* other than these three questions were submitted to the jury, it incontestibly follows, that if any fact stated in the special pleas was at issue, the same was *withheld from the jury.* On this hypothesis, it is obvious that the court erred: first, in submitting to the jury questions *not at issue;* and, second, in *not submitting* to the jury such facts as were at issue.

There is *only* one replication, and that is to the amended or second plea. In that the plaintiff merely says, that "*this plaintiff* did "not have any knowledge, or information, or notice whatever, *of* "*the facts* averred in defendant's said plea, as *constituting* the *said* "*defence*, of failure of consideration to the said note, neither be- "fore, nor at the time of the endorsement and transfer of the said "note to this plaintiff by the payee, and before the maturity "thereof."

The language of this pleading, after the word "NEITHER," is somewhat obscure. However, no more can be eviscerated from it than that the plaintiff was wholly ignorant, (up to the time when the note matured,) that the same had been "*made* and delivered" to the Racine and Mississippi Railroad Company, in full and ab-

solute payment of its capital stock, and that said stock *had never been of any value whatever*. It is even doubtful whether the replication sets forth anything more than the fact that the plaintiff was *ignorant* of the fact that the stock had always been *worthless*.

Had he been ignorant of *this fact*, and have known that the note was given in full and absolute payment of the alleged stock, the replication would have been as true and available as though he had been ignorant of both facts. The only language in the plea to which this replication can be applied, is near the close.—Substantially it is, "*that at, and prior to, the time when the plaintiff became possessed of said note;*" (not at, or prior to, the time when the same was endorsed to him, because, by another plea, the fact of endorsement was denied,) he, the plaintiff, was informed and knew that the note had been made and delivered in full and absolute payment of capital stock of the payee-corporation, and that the stock never had been of any value whatever, and that by means thereof, the consideration of the note had wholly failed. The issue upon the averred knowledge of the plaintiff, for what the note was given, and that that commodity had never been of any value, should have been *submitted to*, but was *expressly wtthheld, from the jury*. In one part of the charge, the court says that it apprehends there can be no doubt but the plaintiff knew for what the note was given. This was clearly so upon the evidence. On cross-examination, Fletcher Cooper, the plaintiff's agent, was interrogated, and he answered as follows:

Q. "Your father knew what these notes and mortgages were "given for?" A. "He told me, from information he received "from Mr. Wilkinson, before I came west."

Q. "Did it not occur, at the time, that it was a very extraor- "dinary course for the farmers, and did you not, on that account, "make inquiries for the purpose of satisfying your mind?" "It was always understood that the manner of receivi "money was for the building the road."

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Q. "Your father knew what these notes and mortgages were "given for?" A. "He told me, from information he received "from Mr. Wilkinson, before I came west."

Q. "Did it not occur, at the time, that it was a very extraor-"dinary course for the farmers, and did you not, on that account, "make inquiries for the purpose of satisfying your mind?" A. "It was always understood that the manner of receiving the "money was for the building the road."

Q. "Was the matter talked over?" A. "That was con-
"versed upon between my father and Mr. Wilkinson."

Q. "Your sole object was to examine the land?" A. "Yes,
"sir." (Printed record, 156.)

It will be seen that this amended plea sets up that the note was given for thirty-seven shares of stock in the Racine and Mississippi Railroad Company, and that the company gave the defendants its agreement to pay the interest on the note and save him harmless therefrom; and that the defendant was induced to do so, by the representations mentioned in the plea, and which are averred to have been false and fraudulent, and made for the purpose of defrauding the defendant out of the note and its accompanying mortgage. *First.* The consideration for the note is averred to have failed. *Second.* That the note was obtained from the defendant by certain specified false and fraudulent statements and representations. It might well be true, that the note was obtained *by fraud*, and it might also be true, that the consideration of that note had failed. *Fraud* is equally as good a defence as that of failure of consideration.

These separate defences are not convertible.

Each is a complete bar in itself. The fact that the defendant was induced to give the note for the averred stock consideration, *by false and fraudulent* representations, does *not change* the consideration *in fact;* nor does it touch the question whether that stock was wholly worthless, whereby the consideration of the note failed.

While the replication attempts to, and perhaps does, put in issue the fact that the plaintiff had knowledge, information and notice prior to, or at the time of, the acquisition of the note by him, that the consideration thereof had failed; YET, it in no manner controverts the averment that the consideration had, in fact, failed; nor does it controvert the fact that the note was procured from the defendant by the false and fraudulent misrepresentations men-

tioned in the plea; nor does it controvert the allegation that at, and prior to, the time when the plaintiff became possessed of the note, he was informed and knew, that the note had been procured by the alleged false and fraudulent representations; nor does it controvert the allegation that the note was given under the agreement of the railroad company to pay the interest on the note and save the defendant harmless therefrom; nor does it controvert the fact that at, and prior to, the time when the plaintiff became possessed of the note, he was informed and knew that the note was given under the alleged agreement. These incontroverted, and of consequence, admitted facts, constituted as complete a bar to the action as it is possible to present in any case.

Judgment should have been given for the defendant, as *one* complete bar to an action is all that the law requires to defeat the plaintiff. In this respect, the judgment is erroneous, and should be reversed. In *Bridge* v. *Payson*, 5 Sanf. S. C. R., 217, the court says: "But a judgment entered upon a trial in the face of "an admission by the pleadings, showing that there ought to be "no such judgment, would be erroneous." No evidence can control or do away with the effect of an admission by the pleadings. To permit this, would be to give *greater effect* to evidence than to the solemn admissions in the record. Both cannot have effect given to them when in conflict. The record is the most reliable and veritable,—is the best, and must prevail so long as a difference is recognized between inferior and superior. So firmly is this doctrine rooted in jurisprudence, that Starkie, in his work on Evidence, vol. 1, page 640, says, that the "*jury cannot find against* "*the admissions of the parties on the record, though they be contrary* "*to the truth.*" In *Parkhurst* v. *Magraw*, 24 Miss. R., 134, the court says: "Facts, *which the pleadings* admit, cannot be contra- "dicted or varied by the evidence. Evidence is *only intended* to "establish *contested facts.*" *Vide*

Hackett v. *Richards*, 11 Leg. Obs., 315.

In Smith's Leading Cases, 5 Am. Ed., page 595, it is said: "It "would seem well settled that every averment in pleading, which

" is material and traversable, and not traversed, is virtually ad-
" mitted. *Bingham* v. *Stanley*, 2 Q. B., 117; Stephens on Plead-
" ing, 255. Nor will a protestation against the truth of the matters
" not traversed, aid the difficulty, or *avail* anything in the suit in
" which it is made. Hence, it necessarily follows, that if the
" plaintiff does not choose to encounter the risk of delay of de-
" murring to a plea bad for duplicity, he must confess, or avoid, or
" traverse *both the defences* which it sets up against him; and that
" if he does not, and limits himself to protesting against the truth
" of the one, and denying the other, the *existence* of the *former*,
" in *full force* and unanswered on the record, will be a reason for
" denying him judgment on *any verdict* which he may obtain on
" the latter, or even for giving judgment again him, *non obstante*
" *veredicts.* *Richards* v. *Allen*, 1 Bibb, 189; *Cutty* v. *Dendy*, 3 A.
" & E., 323; *Gould* v. *Ray*, 13 Weed, 639."

In the second volume of the same work, Smith's Leading Cases, 687, is the following: " It is well settled that estoppels of record
" may grow out of the express, or implied admission made by the
" parties in pleading, and *are not* necessarily limited to the points
" passed upon by the court or jury. Thus it has long been held,
" not only that an express *allegation* or confession will be *con-*
" *clusive* on the party who makes it, but that the *traverse* of one
" averment, is a *tacit admission of every other*, which is material
" and traversable in the same pleading, notwithstanding a protes-
" tation against its truth, *and, although the failure to deny* it, may
" *have arisen from the necessity* for avoiding duplicity. *Hardy* v.
" *Williams*, 11 Iredell, 499; *Taylor* v. *Parkhurst*, 1 Bur., 97. And
" it is equally well settled that an *adverse verdict on the issue,*
" *joined on such a traverse*, will convert this determination into an
" estoppel, and thus render binding in all future controversies.
" Coke Litt., 124, *b*, 126 *a*; 2 William Saunders, 130, *a*, note 1,
" for the law *will presume that the pleader has submitted the strong-*
" *est point in his case* to the determination of the jury, and would
have been equally unsuccessful had he joined issue on those which
were weaker."

This branch of the law is so well settled that a further citation of authorities, would be an ostentatious display of learning.

Had the plaintiff chosen to deny that he had the information or knowledge charged upon him, he could have done it easily. The averment is in this pointed language: "And the said defendant "further, in fact, saith, that at, and prior to, the time when the "said plaintiff became possessed of the said promissory note, he, "the plaintiff, was informed and knew, that the said promissory "note had been obtained from the said defendant by the afore-"said false and fraudulent statements and representations, and "under the aforesaid agreement between the said defendant and "the said corporation." As the plaintiff is charged with a knowledge that the note was obtained by the alleged false and fraudulent representations, and under the agreement mentioned, it must be conclusively presumed that he had this knowledge, as he did not deny the fact.

II.

It will be seen, that the court, in its charge to the jury, considered the question whether the note had been endorsed by the payee corporation, as in issue between the parties. This question either *was* or *was not* in issue. If it was, that question was one of fact, and *should have been* submitted to the jury, but *was not.*

The court decided the question in favor of the plaintiff, and as we think, clearly against the evidence. If the question was *not at issue*, because there was no replication to the pleas, alleging that the payee corporation had never endorsed the note in question, then the court erred in charging the jury upon the question of endorsement, to the effect that the note was properly endorsed by the payee (and to which the defendant excepted). Because if the *non-endorsement* stood admitted by the pleadings, then the plaintiff could not recover as endorser. But the court, in substance, told the jury that if the plaintiff *did not* know that the note had been obtained by false and fraudulent representations, or that the

payee made the agreement mentioned in the defendant's first special plea, he could recover.

The whole question of endorsement is here taken from the jury, and they are essentially told that whether the note was endorsed or not, was wholly immaterial. That they had nothing to do with that question. They had all to do with it, if that fact was in issue. If not in issue, then it was error to tell the jury the plaintiff could recover upon some other state of case. That fact admitted, defeated the plaintiff; so that there is no way of overcoming the proposition that the court erred.

The pleas alleging *non-endorsement*, properly or improperly concluded with a verification, and we assume properly, as they set up matter which the plaintiff was *not bound* to prove, in consequence of any thing alleged in his declaration, as to the endorsement of the note. The general issue did not put in issue the allegations in the declaration, that the note had been endorsed to the plaintiff. The statute required a special plea, verified by affidavit, in order to enable the defendant to raise the question, or to make admissible any proof as to endorsement. This being so, the facts alleged in such special plea, must be taken to be true, unless controverted by replication. When thus controverted, the proof would be *to the issue, joined on the special plea*, and *not to any* issue on the declaration. The statute clearly would not require a plea upon which *no issue* could be joined. When joined, and that issue is one of fact, there must be a verdict upon *that* issue, or judgment for either party would be erroneous. An issue of fact on such a plea must come through a replication.

The special plea of *non-endorsement*, was one upon which an issue of law or of fact could have been joined.

If the conclusion by verification was wrong, the plaintiff should have demurred for that cause. Not having demurred, the allegations of the plea could and should have been traversed.

Not having been traversed, the *non-endorsement* is admitted by the pleadings within the authorities before cited. The record

stands thus: The plaintiff admits that he is not entitled to recover *as endorser*, and that he cannot recover except *as endorser*, and yet has judgment *as endorser*.

The fact that the plaintiff did not reply to these special pleas of *non-endorsement*, will not divest them of the qualities of issuable pleas. When he does not demur, or reply to them, he accepts them, and concedes the truth of the facts alleged.

And he cannot covenant a plea which *concludes with a verification*, into one concluding to the country; when an omission to add, the similiter would be immaterial after verdict. But if this could be done, then the question of endorsement was in *issne as a fact*, and the consideration of that fact was excluded from the jury, and that portion of the charge by which that was done, was excepted to by the defendant.

As to other points of the charge, bearing upon the question of endorsement, we submit the following considerations:

Upon this question an exception was taken by the plaintiff in error, to that part of the charge of the court in these words: "There may be a question whether this was not legally a good "endorsement of the note by the payee, the Racine and Missis- "sippi Railroad Company. It is true, the endorsement was not "written on the back of the note, but it was written upon a paper "which was attached to it, and which *it was intended* should be- "come a part of it." Pages 168, *side* 289, 166, *side* 282 printed record. The instrument here referred to, as attached to the note, and in which was written an endorsement of the note, is the *bond* of The Racine and Mississippi Railroad Company. How it could have been *intended* to make this somewhat extensive and *anomolous* bond a part of the note, is not, to us, easy of comprehension.

Effectuating such intention, would have been an extraordinary feat of *juridical infiltration*. Had the intention been to endorse the note, it cannot admit of doubt, that the *ordinary and easy mode* would have been adopted, by placing the same upon the back thereof, which was *clean* paper, and where there was abun-

dance of room; and the unusual and difficult mode, by words assigning the note and mortgage in a bond—an independent instrument—negatives the idea of an intention thereby to endorse the note. This intention is further negatived by the words in the bond, "Which said note and mortgage are hereto appended, and "are transferable in *connection* with this bond, and *not otherwise*, "to any *parties* or *purchasers whomsoever*."

This language was the creation of a power in the *first* holder of the bond, to transfer the *note* to a subsequent purchaser of that bond, in connection with it. But that power was *restricted*, and *could not* be exercised at all without a transfer of the bond. The company could of course authorize any one it saw fit to transfer the note absolutely, conditionally, or with limitations or restrictions.

That power could be exercised by the *constituent*, whether *he had* or *had not* an equitable interest in the bond and note, or in either. This power vested and exercised, would vest in the transferee by endorsement, the legal title of the note; and, if thus vested, before the maturity of the note, that endorsee could do what he pleased therewith; but this would not be so with the *first* constituent or grantee of the power. The grant of this power to transfer was wholly useless, if the legal title to the note was passed to the *first holder* (in this case, Tunis Cooper), by the words of assignment contained in the bond, because, in that event, his power of further transfer by endorsement, was complete by the law merchant; and this principle of law is conclusively presumed to have been known to the payee corporation, and to Mr. Cooper, and this being so, when the corporation, by express words, confers upon him (and he accepts) a power to transfer the note to some one else, both are chargeable with the fact, that they intended the words of power should mean something, and be effective, and not that they were mere idle words, without legal effect in the instrument.

Cooper being the grantee of the power, could not exercise it by endorsing the note to himself. This branch of the law he seems

to have understood, otherwise he would not have required or desired an endorsement of the note by Durand, president of the corporation.

To hold that, by the language of the bond, the intention was to endorse the note, is to eviscerate the very reverse of the ordinary meaning of words and of commercial transactions, and the reverse of what was intended as shown by the subsequent acts of the parties in making on the one side, and procuring on the other, an endorsement on the note in question. The law merchant does not tolerate endorsement of negotiable paper by the unique mode of a bond of the payee, containing words of assignment, with a *power of transfer* to others.

The court, however, did not, in terms, here charge the jury that this bond assignment was an endorsement of the note, but in the first instance put the case to the jury upon the endorsement by Durand, as president of the corporation. The point we here make is, that the court, without charging one way or the other, as to the matter then in hand, used expressions which were calculated to, and probably did, mislead the jury.

That is, from the language employed, the jury, had they finally been permitted to pass upon the question, might have believed that the bond assignment was an endorsement of the note, and thus have given a verdict for the plaintiff below, *when*, at the same time, they disbelieved the testimony of Durand, and believed that of Stover; that a resolution was negatived by a vote of the directors of the corporation, by which it was proposed to authorize Durand to endorse this class of notes.

Upon this question of endorsement, the plaintiff in error took another exception to the charge of the court, which is in the words following, namely:

" *If you believe this, in contradiction* of another witness, who " says that there was a resolution introduced, no record of which " was made, giving authority, and it was voted down, then I think " there is no doubt that there was a valid technical endorsement

" made of the note, because, if his statement is true, it was done " with the knowledge and consent of the board of directors, and " *in fact* it would have been a breach of good faith for the board " of directors to withhold the endorsement from the note, if that " were necessary, *because they had transferred the note,—they had* " *got value for it in cash,—and it was right that they should give* " *to the plaintiff all the power and control over the note which they* " *themselves had.*"

Immediately preceding this instruction, the court told the jury what the facts were, as predicated on the testimony of Durand as to his endorsement, and authority to make it, and as to the resolution which was defeated, as sworn to by the witness Stover. And speaking of Durand, the court says: " It was *thought*, he says, " by the board, that no additional authority was necessary to en- " able him to make the endorsement, and it was made according- " ly." This was a rather flat disposition of facts, which may be looked into hereafter, as we proceed with this point, to see if the court was not mistaken as to the facts involved.

But for the present, we will consider the instruction now in hand.

Here the court told the jury that a valid technical endorsement of the note was made, if they believed the statement of Durand, that it was thought by the board of directors that no additional authority was necessary to enable him to make the endorsement, in contradiction of another witness, who testified that a resolution to give the authority was introduced, of which no record was made, and that it was voted down by the board. This, in effect, is saying, that when a corporation is the payee of a note, and its board of directors "*think*" that it is "*not necessary*" *to confer an authority* upon a particular person or officer to endorse the note payable to its order, that *then* that particular person or officer *has* the authority to endorse the paper.

How, *thinking* that it is *unnecessary* to confer a power to make an endorsement, *will give* the power to do it, and that, too, when

the thought is that of a board of directors, is, we apprehend, beyond the reach of the most prehensile legal mind.

This, however, is the "*solid extract*" of the whole language employed. The legal sense cannot be differently interpreted in consequence of the fact that the expression was "*additional authority*," instead of "*authority*" without the word "*additional;*" because, if Durand had authority to make the endorsement before, and at the time the board of directors were seized with the thought that additional authority "*was unnecessary*," their thought in any direction could not by any possibility affect the existing authority. It will not do to say that Durand had a *few ounces* of authority, but *not sufficient* to enable him to do the single and indivisible act of endorsing the note.

He either had *sufficient* authority to perform that act, or he had no authority whatever over or in regard to that subject.

If he had no such authority, then no kind or quantity of thought would confer that power. If he had *such authority*, then the least possible thought would have been useless superfluity.

Hence the thought of the board of directors, however intense, could not possibly have effect upon this question of authority.

But the court proceeded to give a reason why there was (on the state of case supposed) a valid technical endorsement, and that was, "Because, if his (Durand's) statement is true, it was done "with the knowledge and consent of the board of directors."

This was deciding a question of fact, as we think, not at all warranted by the evidence. The court further said, that "In fact "it would have been a breach of faith for the board of directors "to withhold the endorsement from the note, if that were neces- "sary, because they had transferred the note,—they had got value "for it in cash,—and it was right that they should give to the "plaintiff all the power and control over the note which they "themselves had." Here, again, we think the province of the jury was invaded, by the decision of a number of facts; and that

the language was directly calculated to prejudice the jury against the defendant below, and prompt the return of a verdict in favor of the plaintiff.

To do so, was error.

What was the statement of Durand, to which the court alluded when it told the jury that if his statement was true the written endorsement upon the note in question was made with the "*knowledge and consent*" *of the board of directors*? This is shown in the context.

The court says: "He (Durand) says that it was the subject of "conversation in the board of directors; that endorsements were "made by him from time to time, in the presence and with the "knowledge of the board; and he gives the reason why." What did the directors or any one else say in this connection? Durand does not, nor does any one else tell us. He simply says that the matter of such endorsements were the subject of conversation. Not knowing what was said, we cannot reasonably form an opinion whether the individual directors or the board,—the minority or majority thereof,—consented to the endorsements or not; for Durand does not say whether a *quorum*, or what number engaged in the conversation. They might have been the minority who were defeated on this identical question, as sworn to by the witness Stover. This, the most natural and reasonable conclusion, would leave Durand's statement, and also the statement of Stover, true in fact. When different witnesses make statements apparently, at first view, contradictory, the law requires such construction to be put upon the language of each as leaves both credible, and what each says actually true, when that can be done by giving full effect to every word used by each.

We have seen that the application of this rule leaves as true in fact what Stover swore to, and what Durand testified upon the point in question.

Again, Durand does not say when these conversations occurred; whether *before* or *after* he in fact wrote his name on the back of

this note. It may have been long subsequent. It, however, is enough to know that this conversation did not occur at or about the time when the plaintiff Tunis Cooper swears that this endorsement was made; and that there is no pretence that Durand did this act either in the presence or with the knowledge or consent of the board of directors. The whole board may have been willing, and may have consented, or even have directed him to make similar endorsements upon other paper which was before them, so that the body, or the individuals of which it was composed, would know that it was right or proper to do so.

Such endorsement before the board, would be the *reverse* of holding to the world that Durand had general or special authority to endorse notes made payable to the corporation.

When Durand says that it was thought not necessary to pass the resolution conferring upon him the power of endorsement, he essentially testifies that the resolution was defeated by the board. Stover swears to this defeat positively. His recollection was distinct. It was a question of great importance to the people in his neighborhood, and hence, he would be likely to have it clearly and strongly impressed upon his mind. He recollects the fact that the resolution was defeated by a majority of one. This was in 1858.

Cooper, the plaintiff, swears that Durand endorsed the note in 1859 or 1860. This was long after the Board of Directors had said to Mr. Durand, by the negative vote on the above mentioned resolution, "You are not authorized, and you must not endorse "these notes. The company have made all the assignment of this "class of paper it intends to, in its own bonds."

Durand himself says: "The fact is, that I never was, by any "special resolution, authorized to endorse them; but I was not "only president of the company, but was also appointed by a res- "olution of the board a financial agent."

By being president and financial agent, without special power conferred, he would have no power whatever to endorse notes for the corporation.

The duties and powers in each station must be defined and conferred by special act of the managing board. A railroad company is not a moneyed corporation like a bank, whose cashier has power to endorse paper for the corporation from the very nature of his employment, originating, at least to some extent, from necessity.

To endorse negotiable paper by an agent, the authority must be express. In 1 Parsons on Contracts, 5 Ed., page 62, it is said: "Agents' acts in making or transferring negotiable paper, (*especi-* "*ally if by endorsement,*) is *much restrained.* It seems that they *can* "*be authorized only by express and direct authority*, or by some "*express* power which *necessarily* implied these acts, *because* the "power *cannot* be executed without them."

Paige v. *Stone et al.*, 10 Metcalf, 160–168.
Emerson v. *Prov. Hat Manufacturing Co.*, 12 Mass., 237.

Durand did not sell the note in question. Mr. Wilkinson sold it to the plaintiff. (Record, 250 and 251.)

So that Mr. Durand had no earthly power to endorse this paper which could be implied from a power to sell. If such power is to be implied from a power to sell the paper, then Wilkinson, who sold the note, should have made the endorsement. But it is incontestibly shown that it was *not* necessary to exercise the power of endorsement in order to exercise the power to sell, because the sale was made and the purchase money paid without endorsement. This was done in 1856, and the endorsement was not made until 1859 or 1860.

If Mr. Cooper was willing to, and did take this paper and pay his money therefor, without endorsement, then he received all he expected to obtain for his money; and the subsequent endorsement had no *consideration* to uphold it.

Durand himself swears that he had no special authority to make endorsements of this kind of paper; nor had he any *implied* authority to do so, as to this particular paper. He was not authorized to sell, nor in fact, to do any single thing with or about the note. Any other person in the world had just as much authority to endorse this paper as Durand had. And it certainly cannot be maintained that any and all persons can endorse paper for a corporation, simply because they choose and assume to do so. Yet this proposition must be maintained as law, or this action cannot be maintained by Mr. Cooper as endorsee in his own name. We think that it has now been fully shown that the conclusion of the court below, in its charge to the jury upon this question of endorsement, was not warranted by the evidence, even if it be granted that the facts might be disposed of by the court, or made the subject of charge to the jury. The very reverse was clearly established by the evidence. The note was sold by Wilkinson as agent of the payee corporation in 1856,—that in 1858 a resolution was negatived, by which it was proposed to authorize Durand to endorse this class of paper; that Durand never was specially authorized to make such endorsements, and that *he*, and *not* the selling agent, in 1859 or 1860, made the endorsement.

Suppose, as said in the charge of the court, that it would have been a "breach of faith for the Board of Directors to withhold "the endorsement from the note, because they had transferred the "note and had got the value for it in cash." Such breach would not make the endorsement, nor would it give authority to Durand to make it, nor would it change the law so as to enable Cooper to maintain an action thereon in his own name. All of this language was inappropriate to the question under consideration, and could only tend to prejudice the jury against the defendant, and insure a verdict for the plaintiff. We think this was error.

The court, however, (as we have shown,) did not stop here, and leave the jury a remote chance of passing upon the facts as to the endorsement, but took the whole matter from them, and decided that without regard to this question, the plaintiff was entitled to

recover, if the jury negative certain other facts. Such, we say, was the legal effect of the charge of the court to the jury.

III.

The fact alleged in the second and amended plea, that the note was given for the purpose of aiding the payee corporation in the construction of a railroad in Illinois, where it had no authority to construct such a work, and upon the statement, by the corporation, that every dollar realized upon the note in question, and others of like kind, should be expended on the railroad in Illinois, which the company represented it had authority to construct, either *was* in issue as a *fact*, or it *was not*.

If this fact *was not* in issue, but stood admitted by the pleadings, then the judgment is erroneous, because it is in direct conflict with a complete bar to the action admitted of record. If that fact was at issue then, the court erred in refusing an instruction to the jury which was prayed by the defendant, and to which refusal the defendant excepted. That instruction is as follows: "That the plaintiff could not recover upon the promissory note, "which had been read in evidence, if the jury believed, from the "evidence, that the same was made and given by the defendant "to the Racine and Mississippi Railroad Company, as alleged by "the plaintiff in his declaration; and they, also, from the evi- "dence, believed that said promissory note was so made and giv- "en, for the purpose of aiding said railroad company in the con- "struction of a railroad in the State of Illinois, and that the "plaintiff knew, or was informed, that said note was given for "that purpose, at or prior to the time when he purchased the "same." Printed record, 163; side page, 274.

Clearly, this instruction should have been given, if the facts were in issue. We have already shown that the plaintiff knew the purpose for which the note was given, by reference to the testimony of Fletcher Cooper, who was the agent of the plaintiff, and sent by him to look at the land mortgaged by the defendant,

to see whether it was good security for the amount of the note, before he would, or did, part with his money for the paper.

But, independently of what we have already shown, Fletcher Cooper testifies upon this question, when he discovered the company were engaged in constructing a railroad through the defendant's neighborhood in Illinois, he must have been dull, beyond legal presumption, if his mind did not comprehend the probability that the note was given by the old German defendant to aid the railroad company in constructing that road in that neighborhood. This was sufficient alone, to have put him upon inquiry, and he should have made it, if he was not before advised as to the purpose for which the paper was given. He was bound to inquire, and had no right to be wilfully ignorant upon this subject.

Roth & Co. v. *Colvin, Allen & Co.*, 32 Verm., 125.

To the same effect are:

Pringle v. *Phillips*, 5 Sandford, S. C., 157.
Gill v. *Cubit*, 3 B. & C., 466, (10 E. C. L.,) 154.
Strange v. *Wigney*, Bing., 676, (19 E. C. L.,) 305.
Brown v. *Davis*, 3 Term., 80.
Grant v. *Vaughan*, 3 Burr, 1576.
Easley v. *Crockford*, 10 Bing., 243.
Eagan v. *Threlfall*, 16 E. C. Law, 237.
Down v. *Holling*, 4 B. & C., 330.
Snow v. *Peacock*, 2 C. & P., 215.
Slater v. *West*, 3 C. & P., 325.
Cunliff v. *Booth*, 3 Bing., N. C., 82.
Haynes v. *Foster*, C. & M., 257.
Sanford v. *Norton*, 14 Vt., 228.
Ayer v. *Hutchins*, 4 Mass., 273.
Thomson v. *Hale*, 6 Pick., 259.
Cone v. *Baldwin*, 12 Pick., 545.
Hall v. *Hale*, 8 Conn., 336.
Belthoozer v. *Blackstock*, 3 Watts, 20.
McKesson v. *Stanbury*, 23 Ohio, 213.

Whether the Wisconsin Company had authority to construct a

railroad in Illinois was to be disposed of by the court in giving a construction to the charters of that corporation. The Rockton and Freeport Railroad Company, and the Savanna Branch Railroad Company—two Illinois corporations, and the articles or agreements of consolidation between the Wisconsin corporations and Illinois companies.

A proper construction of these charters and agreements will show that the Wisconsin corporation had no power whatever to locate and construct a railroad in Illinois.

Were the consolidation contracts void or valid? We shall attempt to show that they were absolutely void.

There is no objection to the manner in which the contract of date of January 23d, 1856, was executed, but there is an insurmountable objection to the manner in which the agreement was executed of date February, 23d, 1854, between the Rockton and Freeport Railroad Company and the Racine, Janesville and Mississippi Railroad Company. That objection is that no seal of either corporation was affixed to the instrument. True, the Rockton and Freeport Company then had no seal, but the other company had. But the fact that either or both of these corporations had no seal could not repeal the statute concerning the conveyance of real estate; nor could this fact dispense with the necessity of complying with the requisitions of that statute, in order to transfer the title to real estate, or to such a franchise as that granted to the Rockton and Freeport Railroad Company.

There can be no franchise which imbibes more largely the qualities of pure real estate than the franchise to *locate, take* the land of others, construct, equip and operate a railroad. In fact, a railroad is real estate. The Supreme Court of Illinois has decided that a ferry franchise can only be transferred by deed, as provided by statute for the conveyance of real estate.

Dundy v. *Chambers et al.*, 23 Ill., 369.
Vide also *Kinzie* v. *Chicago*, 2 Scammon, 187.

Vide also *Mayor of Ludlow* v. *Charton*, 6 *Meeson* v. *Welsby*, 819–20–21.

Finlay v. *Railway Co.*, 7 Exchequer, (Welsby, Hurtstone & Gordon,) 415, 420.

The contract between the Rockton and Freeport Railroad Company and the Wisconsin Company *was*, and *is* void for want of a seal, as by its express terms it purported to *grant and convey* the entire *franchise* of company, and also all its stock subscriptions. It is believed that no court has yet held that such a contract between corporations as that now under consideration as to any one of its provisions, was of any validity without seals. Certainly the ancient rule was, that all corporate contracts must be evidenced by seal; and no modern modification or innovation upon that rule will warrant the omission of the corporate seals to such a contract. There are, however, other more potent objections to this contract than the one just considered. Upon an examination of the charters of the contracting corporations, it will be observed that they were not synchronous in any particular *embraced within* the terms of the contract. The powers of each company we will now *concolumn* for the purpose of showing, at a glance, the disagreement between the charters, if the legislation intended these to be the contracting corporations:

The Rockton Company *were* authorized to grant to the Racine Company the right to *construct* and use all or any portion of the road which the Rockton Company were authorized to construct.

The Racine Company *were not* authorized to receive any such grant.

Or,

The Rockton Company were anthorized to *lease* or *purchase* the railroad of the Racine Company. This company could not of course purchase its own road when it had constructed one.

The Racine company were *not* authorized to sell its road to the Rockton Company. Its obligation with the State of Wisconsin was to retain and operate that road as a special or personal trust.

Or,

The Rockton Company were authorized to sell, lease or convey its road, *when it should have one*, to the Racine Company; but the contract does not squint towards *selling*, *leasing* or *conveying* any railroad whatever, as the company had no road to, or which it could convey. This company rested contented by attempting to exercise the first power granted, *i. e.*, to grant the right to construct and use the road which it was authorized to construct; a very *different* power from the *power* to lease, sell or convey a road. Had these been the same power, the legislation would *not have* made them separate and distinct grants of power.

Or,

The Racine Company were authorized to purchase or lease the road of the Rockton Company, of course when it had one; but it had to be in fact a railroad, when they could really see what it was worth, and *not* run the hazard of what it would cost to locate and construct one. That power was never conferred upon the Racine Company.

Or,

The Rockton Company were authorized to consolidate its capital stock with the capital stock of the Racine Company, *and place the management and control of the consolidated stock under the Board of Directors of the Rockton Company.*

Or,

The Racine Company were authorized to consolidate its capital stock with the capital stock of the Rockton Company, *and to place the road of the Racine Company only, and its capital stock so consolidated, under a joint Board of Directors, to be chosen upon such terms as the consolidating companis shall agree upon.*

The legislature of Illinois, not being willing that the consolidated stock should be under the control of a foreign corporation, *even*

partially, provided, that in case of consolidation the whole should be under the board of directors of the Rockton and Freeport Railroad Company—a home corporation, and subject at all times to the jurisdiction of this state. This would, perhaps, give the Rockton and Freeport Railroad Company control, not only of its own road, when completed, but of the road of the Wisconsin company. But this company were only authorized to grant the right to the Wisconsin corporation to construct and use the road which it was authorized to construct, *or* to consolidate its capital stock with the Wisconsin company in the way designated. It could do either *the one* or *the other;* but it was not authorized to do both, for the reason that these powers were granted in the *alternative*, and both things could not consistently be done. It is a high privilege to dispose of great corporate rights to a foreign corporation, which must, of necessity, dwell in the place of its creation, and of consequence beyond the jurisdiction of this state, where great trouble might be given to the home government and its people, for which no adequate redress could be obtained.

In all such grants of power, prudence alone imperatively demands a strict construction of the language employed in the instrument conferring the power; and no power not plainly appearing will be held granted.

Fair running connections between corporations of adjacent states are beneficial; but consolidations of their capital stock only tend to evil, and are odious in the extreme, as tending to unmanageable monopolies and scape-grace speculations.

The Wisconsin legislature not being willing to give the Racine and Mississippi Railroad Company the control and management of an Illinois road, *even partially*, in case it should consolidate its capital stock with an Illinois corporation, used no language which can be tortured into a grant of such power, but did say that it should have full power to place the *road of that* company in Wisconsin, and its capital stock so consolidated, only under a joint board of directors, to be chosen on such terms as the *directors* of the companies consolidating their capital stock should agree upon;

nor did the legislature of Wisconsin attempt to confer upon this company, of its own creation, the power to construct, nor to *buy* the right to construct any railroad in Illinois; much less was it attempted to confer the power to exercise the *franchise*, and almost sovereign power, of *locating* a line of railroad in Illinois. Had the legislature of Wisconsin attempted to confer either of these powers upon that home-created body, it could not have done so; its legislative power is walled in by the territorial lines of the state. In *Middle Bridge Corporation* v. *Marks*, (26 Maine, 13 Shepley, 228,) the court say: "The legislature of *this state had no power to* "*authorize or create a corporation* to build that end of the bridge, "*it being out of the limits of the state.* As an incorporated body, "therefore, the plaintiffs, by virtue of their act of incorporation, "can have *no claim* to any *use of a privilege or exercise of author-* "*ity therein.*" To the same effect, and going beyond, in some particulars, is the case of *Miller* v. *Ewer*, (27 Maine, 14 Shepley, 509.)

But no citation of authority is necessary to sustain this proposition. To maintain the converse of this would be to give one sovereignty the power to declare what may be, and by whom, done in another sovereignty. This would be to make territorial lines a decayed shadow, and sovereignty a *nondescript.* What a state cannot do directly it cannot authorize to be done by its own creation. No power, general or particular, can be transferred except by a body in which it exists; otherwise we should be presented with the anomalous sight of a powerless body creating a power.

Thus far the argument has gone to the point of subject matter.

When a corporation has power to contract as to specified *subject matter*, either by way of *purchase* or *sale*, the corporation may, through agents, contract in relation thereto in a state other than that of its creation, unless prohibited by the laws of that other state, or unless the so doing would be in contravention of the public policy thereof.

The Bank of Augusta v. *Earle*, 13 Peters U. S., 519.
Miller v. *Ewer*, 14 Shepley, 519.

But in all cases it is essential that the corporation should first be *invested* with the power to make the particular contract. If that power is not granted it *cannot* be exercised in any form, either in the state where the corporation was created, or elsewhere.

And there is no difference in principle between a power to *transmit* and the power to *receive*—each power must be granted. If the corporation has not the power granted to receive the particular thing attempted to be granted by a party fully competent or authorized to make the grant, the contract is void; it being a fundamental principle of law, that to make a valid contract there must be at least two competent contracting parties. But the rule as to corporations does not stop here; it goes farther. When, therefore, a corporation is authorized to contract concerning real estate, either by way of *receiving* or *transmitting* title by a specific mode, that mode must be pursued or the conveyance is void. The reason is, that the particular capacity is wholly artificial by *special* grant; and not natural by birth, or universally acknowledged right; and being required to be exercised in a specified manner, is an implied prohibition to its exercise in any other manner. In the *People* v. *The Utica Insurance Compauy*, (15 Johns, 383,) the court, THOMSON, J., say: "The specification of certain powers op-"erate as a restraint *to such objects only*, and is an *implied prohi-*"*bition* of the exercise of other and distinct powers. A contrary "doctrine would be productive of mischievious consequences, es-"pecially with us, where charter privileges have been so alarm-"ingly multiplied." This is a wholesome decision, and was made by a very able court, and before this vast country was controlled by corporations, and handled by them for its ruin, and their aggrandizement. But the question of necessity to take has been settled by the well considered case of *Metropolitan Bank* v. *Godfrey et al.*, (23 Ill. 579.)

In that case Justice BREESE correctly says: this "bank can ex-"ercise its faculties *only* in the *mode* and *manner* prescribed by

" the banking laws; it is so with *all bodies*, officers or persons, hav-
" ing a *statutory existence only*. It was declared in the case of
" *Head & Amory* v. *The Providence Insurance Company*, (2
" Cranch, 150.) In its corporate capacity a corporation is a mere
" creation of the act to which it owes its existence; it may *correct-*
" *ly* be said to be precisely what the act creating it has made it;
" to derive all its powers from the act; and to be capable of exert-
" ing its faculties only in the manner that act authorizes."

Again, on page 610: "*No power has been granted to the Metro-*
" *politan Bank to be, by its corporate name, the grantee of lands.*
" It is *indispensible* to the *validity* of conveyances, that they
" should be made to the officer indicated by the bank. That
" functionary alone has the capacity to take lands conveyed for
" the use of the bank."

Judge CATON, in his opinion, uses nearly the same language as to this point. His language is:

" I think it is satisfactorily shown in the opinion, that the bank
" possessed no legal capacity to receive the conveyance of real
" estate, in its corporate name, and that the conveyance was ab-
" solutely void for want of a grantee capable of taking and hold-
" ing the land. The law not only failed to confer upon the bank
" the power to take the deed, but it impliedly forbid it to receive
" the conveyance, by expressly directing that it should be given
" to another."

If there are any correct principles laid down in any modern adjudications, clearly they are contained in the two opinions quoted from.

Dwarvis on Statutes, 713.
Broom's Legal Maxims, 285.
People v. *Utica Ins. Co.*, 15 Johns, 383.
N. Y. Fire Insurance Co. v. *Ely*, 8 Cow., 699.
North River Insurance Co. v. *Lawrence*, 3 Wend., 481.

U. S. v. *One Case of Hair Pencils*, 1 Paine, C. C. R., 406.
Stradling v. *Morgan*, Plow., 206.
Slade v. *Drake*, Hob., 298.

We may now state, *first*, that the Illinois Supreme Court has decided that a franchise can only be conveyed by complying with the statute concerning the conveyance of real estate. 23 Illinois, 369.

Second. The statutory right to locate, construct and operate a railroad is a franchise. "A franchise is a special privilege conferred by government upon individuals, and which do not belong "to the citizens of the country generally, of common right." *Bank of Augusta* v. *Earle*, 13 Peters, page 195. The citizens of Illinois *generally*, have no right to locate, construct and operate a railroad. Hence the right to do this is a franchise.

Third. A deed made by a natural person, laboring under no disability, but fully competent to convey his lands by deed to the Metropolitan Bank, of New York, was held to be absolutely void, and was cancelled by that court because it was made to the corporation by name, when it should have been made to its president, if made for a purpose for which the bank might take for its use a grant of lands to the president thereof; and because that deed was not made for any purpose, for which even the president could receive a grant of lands for the *use of the bank.* Such was the fate of that deed, although for certain specified purposes, the president of the Metropolitan Bank was authorized to receive the grant of lands for the use of the bank.

Fourth. The Racine, Janesville and Mississippi Railroad Company, was never authorized, or empowered in any way, or form, to receive by deed or otherwise, the right to locate, construct and oporate a railroad in Illinois; and of consequence having no capacity to receive such a grant, that part of the contract of February 23d, 1854, between it and the Rockton and Freeport Railroad Company, is void, and would have been void had the seals of

both corporations been thereto affixed; being void, the Racine, Janesville & Mississippi Railroad Company, did *not* acquire *a line* of railroad in Illinois, nor the *right* to *locate* and *construct* one.

The right and power to locate a railroad is *paramount* to, and *different from*, the right to *construct* and *use* the road. There could be no construction until there was a location. Location requires more discretion and judgment than construction does. Location may be made by one. Construction may be performed by another. Corporations possess no power to re-delegate their powers or franchises, except in so far as they are expressly authorized so to do.

But it is to be remembered that this Rockton Company was not authorized to transfer to any other corporation whatsoever *its charter*, nor all its corporate powers or franchises. Among those things, rights, powers and franchises which it *was not* authorized to transfer, we enumerate the following: 1st. Its power to mortgage its line of road. 2d. Its power to borrow money and to mortgage its franchises, or any of them. 3d. Its power to *locate*, or survey and determine the line of its road upon such route as the company should deem most eligible. 4th. Its power to regulate the time and manner in which goods, effects and persons should be transported on its road. 5th. Its power to determine rate of toll for the transportation of persons and property on or over its road. 6th. Its power to determine the sum to be paid for the storage of merchandise and other property under its charge. 7th. Its power, by its engineers and agents, to enter upon the lands of others for the purpose of making the necessary surveys and examinations of its road. 8th. Its power to enter upon, take and hold all lands necessary for the construction of its road, branches and appendages, upon making just and reasonable compensation to the owners of such lands for damages that might arise to them from the building of said railroad; and when no agreement could be made as to such compensation, to compel such land owners to yield such necessary amount of land, under that part of the revised statutes entitled the "Right of Way." These

were important, in fact essential and indispensable, in order that a corporation might lawfully construct and use a railroad. The Rockton Company was *not* authorized so transfer any one of these rights, powers or privileges, termed franchises, and the Racine Company was not authorized to receive any one of them, by grant or otherwise. No one can seriously doubt that all these powers are, and that each is, different from the power to "con- "struct and use" the railroad. They might, then, all remain in, and be exercised by, the Rockton Company, although that company, in the language of section ten of its charter, had granted to a Wisconsin Railway Corporation "the right to *construct and use*" the railroad by that act authorized to be constructed. By this it is readily seen that what the Rockton Company *were*, in terms authorized to grant, is consistent with what it *was not* authorized to grant. But it is enough to say, that as the Rockton Company was not authorized to transfer, nor the Racine Company was not authorized to receive, the above enumerated rights, powers and privileges, that the contract, by which the transfer was attempted, is wholly void.

But this contract is not only singular as evincing a disposition to do what in law could not be done, but it is anomalous in its provisions throughout.

Its language is: "Hereby granting and assigning to said parties "of the second part, *all the powers, privileges and franchises* con- "ferred by said act."

Next comes an assignment of all the subscriptions to the capital stock. Then comes this language: "The said parties of the "first part in consideration aforesaid, hereby merge and consoli- "date the capital stock of the said parties of the second part, and "hereby place the management and control of the same, together "with all the powers, privileges, benefits, advantages and fran- "chises now held by them by virtue of *their act* of incorporation, "under the Board of Directors, of the said Racine, Janesville and "Mississippi Railroad Company, pursuant to section ten of said "act."

1. All the powers, privileges and franchises of the corporation are in terms assigned to the Racine Company. That, if legal, must have been sufficient to transfer and vest all there was of substance in the Racine Company, and subject it to the control of its Board of Directors. How, after this was done, the capital stock of the Rockton Company could have been in it so that it could be consolidated with that of the Racine Company, is difficult of perception. It is equally difficult to understand how the capital stock, powers, privileges, benefits, advantages and franchises of the Rockton Company could be placed under the control and management of the Board of Directors of the Racine Company, pursuant to section ten of the charter of the Rockton Company, when that section declares, that in "case of consolidation, "the capital stock, (nothing else,) shall be placed under the man- "agement and control of the Board of Directors of the Rockton "Company." The management and control of its powers and privileges or franchises, were to remain in it, not being authorized to be transferred in any part, in case consolidation was effected. The language is: "*And place the management and control of the "same under said Board of Directors.*" Now, *no Board of Directors* is mentioned in the act, except that of the Rockton Company, and this is the only one that can be "*said board.*"

Again, the 4th sub-division of this contract, provides that "the "said parties of the second part, in consideration of the premises, "do hereby agree to *receive the subscriptions* to the capital stock "of the said Rockton and Freeport Railroad Company, and con- "solidate the *same*,(*i. e.*, the subscriptions,) with their own capi- "tal stock, and make *the same* (subscriptions) a part and parcel "thereof, and place the subscribers to the same upon an equal "footing, in all respects, with the subscribers to their own capital "stock."

The Racine Company no where agree to consolidate their stock with that of the Rockton Company, except in the mutual agreement, declaring the intent of the parties in the 8th sub-division, which is as follows: "The parties hereto agree and declare that

" the meaning and intention of this agreement *is to fully merge*
" and consolidate the *capital stock, powers, privileges, immunities*
" *and franchises* of the Rockton and Freeport Railroad Company
" *with the Racine*, Janesville and Mississippi Railroad Company,
" hereby waiving any *omissions* or *informalities*, contravening or
" prejudicing the intentions of the parties hereto."

If the parties told the truth as to their meaning and intention, or of *the agreement*, then it is clear that the *powers, privileges, immunities and franchises* of these corporations were intended to coalesce, commingle or combine, for *without* those properties, the two bodies *could not be merged. If merged*, there was a *transfer of substance from one company to the other*, as much in quality by one as by the other, although, perhaps, of *different quantities.*

This transfer was an essential *grant of franchises*, and required the *seals* of *both* corporations, as much as a *unilateral agreement* would have required the seal of one corporation.

Mayor of Ludlow v. *Charlton*, 6 Meeson & W., 819 –21.

Finlay v. *Railway Co.*, Exchequer, (M. H. & G.,) 415–420.

After these powers had been combined with legal chemistry, it required the action of both corporations in order to borrow money. The *duality must act*, not one of the *ante-constituents* alone.

We will next proceed to demonstrate the fact that the Rockton Company and the Racine Company were never authorized to make *any contract whatever.* Neither company is named in the charter of the other. What one company was authorized to do with *some other* company, and that the railroad of each connected with that of the other at *some* point on the north line of this State, are the *only ear-marks* or *indicia* from which it may be known what *other* company was meant, in the charter of either. The legislature of each State made their laws upon the basis that nei ther had any knowledge that there was a company chartered in the adjoining State, having *synchronous* powers with the corpora-

tion of its own creation. And hence, the powers conferred upon each corporation to contract with a foreign corporation, were authorized to he exercised with one then *chartered*, or one that *might be thereafter chartered.*

The language in the Rockton charter is, "*with* any other rail-"road company *which may have been* or *may hereafter* be incorpo-"rated by the State of Wisconsin, and running from *the terminus* "*of said road in a direction toward Lake Michigan*," that direction might as well have been to Kenosha, Milwaukee or Sheboygan, as to Racine.

Suppose that in 1856, the legislature of Wisconsin had incorporated, or should hereafter incorporate a company, with authority to construct a railroad from the *terminus* of the Rockton Company, on the State line, to Kenosha or Milwaukee, on Lake Michigan, and *with power also to acquire by grant* from the Rockton Company, or the company whose road connected at the State line with that of the Wisconsin Company, the right to "*construct and use*" the road authorized to be constructed by the Rockton charter, or to consolidate its capital stock with such Illinois Company, and place the management and control thereof, under the Board of Directors of the Illinois Company, could there be any doubt that *such* Wisconsin Company would be the *one which* the Rockton Company *were authorized*, by grant, to *transfer* the right to "*construct* "*and use*" the railroad by its charter authorized to be constructed?

It is impossible to doubt this. This being so, it is beyond all question that the Rockton Company was never authorized to make any kind of contract with the Racine Company. It is *possible* that the Wisconsin legislature *may* incorporate a company with power to *receive* what the Rockton Company has power to grant, and to contract as to all other matters mentioned, and as specified in section ten of the Rockton charter. If *possible*, the supposed contingency *may happen*, and *when* it happens, each corporation would have the right to exercise all the powers conferred upon *them respectively*, and no court could properly hold that the

doing so was not legal and obligatory upon each company. The *possibility* of this *contingency* happening, as to each company, was *contemplated* and the respective powers conferred with that view, and if it did not happen, it was *not* intended that the granted power should be exercised, *unless* there was *then*, another company incorporated with powers of *adaptibility*. We have no knowledge that there *then was*, or yet exists, such a company. As the legislature intended, that there should be waiting for the *creation and appearance* of such a company, all *must wait until that time*. The northeastern *terminus* of the railroad of the Rockton Company, *was not* necessarily at Beloit. It might have been at *some other* point fixed by the company, on the north line of Winnebago County; whereas, the southwestern *terminus* of the branch railroad of the Racine Company, by its charter, was fixed at Beloit.

The language of the charter of the Racine Company upon this subject is: "*Their railroad*, at Beloit, with any railroad or branch "railroad *now chartered* or *which shall hereafter be chartered in the* "*State of Illinois*." The above reasoning applies to this language as well as to that in the Rockton charter. The principles involved are so plain as really to require no more comment.

We will, however, consider the question in a different way, for the purpose of showing that the contract of date February 23d, 1854, between the Rockton and Freeport Railroad Company and the Racine, Janesville and Mississippi Railroad Company, was not only void for want of corporate seals, but because, by its terms, these corporations were not authorized to do what thereby was proposed to be done. In *every* particular, *one* or *both* corporations lacked the power attempted to be exercised, in the mode pursued. The Rockton Company was authorized to grant to *a Wisconsin* corporation the right "*to construct and use*" the road which it was authorized to construct. This must be construed to mean, *to a corporation which had the power or right to recieve the grant;* but the Racine Company was not invested with this right or power. The Racine and Rockton Companies were authorized to consolidate capital stock, the Wisconsin corporation with an Illinois, and

the Illinois with a Wisconsin corporation; but no *particular* corporation with which either might consolidate, was named.

The Rockton Company could only consolidate upon putting the stock of both companies under the management and control of its own Board of Directors. The Racine Company could only consolidate upon putting the stock of *both* companies under the management of a *joint* Board of Directors.

As the Rockton Company is not mentioned in the charter of the Racine Company, nor the Racine Company in the charter of the Rockton Company, it is uncertain what particular company either company was authorized to contract with, as to the particulars named in either charter; and we are not *obliged to conclude* that by the Rockton charter it was intended that it might consolidate its capital stock with the Racine Company, and so *vice versa*. But as the whole matter was afloat, and as it must be conceded that the legislature of Illinois must have intended to make the language of the Rockton Company effective, the construction must be that some company of Wisconsin, *other* than the Racine Company, was intended, and that, too, one which had the right and power to receive by grant, from the Rockton Company, the right to "*construct and use*" the railroad which it was authorized to construct; one that also had the right and power to consolidate its capital stock with that of the Rockton Company, and agree that the stock of that company should be under the management and control of the *directors* of the Rockton Company; any other construction would make the language of the charter upon *these* subjects mean nothing. To adopt such a rule of construction, is to hold that the legislature were so ignorant as to *not know* that a corporation *could not take anything by grant, unless it was empowered to receive* that which another corporation was authorized, in general words, to grant or transfer.

It will not do to interpolate into the law this novel mode of construction. The conclusion, therefore, must be that the company, which the Rockton Company was authorized to contract

with, has not yet made its appearance in a contracting mood, and so too, with the company with which the Racine Company was authorized to contract.

We will next pass to the consideration of the consolidation contract between the Savanna Branch Railroad Company and the Racine and Mississippi Company, of date January 23d, 1856.

The Savanna Branch Railroad Company was organized under the general railroad law of Illinois, entitled "An Act to provide "for a general system of Railroad Incorporations," approved November 5, 1849. The company is recognized by an act approved February 12th, 1851, by which it is enacted "that the Savanna "Branch Railroad Company be, and they are hereby, authorized "to commence and build a railroad at and from the town of Sa- "vanna, in the County of Carroll, and State of Illinois, in an "easterly and northeasterly direction, through a part of the coun- "ties of Carroll and Stephenson, on the most practicable route to "intersect the Galena and Chicago Union Railroad, or the Galena "Branch of the Central Railroad, at some convenient point with- "in fifteen miles of the town of Freeport, in said County of "Stephenson; and the road above mentioned is hereby declared "to be of sufficient public utility to justify the taking of private "property for the constructing and maintaining the same." From this act it will be seen that the eastern *termini* of the Savanna Branch Railroad *was not on the boundary line of the State*, but was at some convenient point within fifteen miles of Freeport, on the Galena and Chicago Union Railroad, or on the Galena Branch of the Central Railroad. These last mentioned railroads could only be located and constructed in Illinois; and the boundary line of Illinois cannot be reached in fifteen miles of Freeport. Of this geographical distance, the court takes judicial notice.

This Savanna Branch had no authority to consolidate with a company out of this State, except what it derived from the general act to authorize consolidations, approved February 28th, 1854. The fifth section of that act reads: "*No company in this State* "shall be authorized, under the provisions of this *act, to consoli-*

"*date* with any company *beyond the limits of this State, until the* "*termini of such company in this State shall have been fixed by the* "*laws of this State as the boundary line thereof.*" Now, when we compare this language with the eastern *termini* act above recited, we see that this Savanna Company was *prohibited* making the consolidation contract of date January 23d, 1856. It attempted to consolidate with a company *out of the State*, when it had no *termini* on the State line. The instrument starts as follows:

"Articles of agreement, made and concluded this 23d day of "January, 1856, by and between the Savanna Branch Railroad "Company, *a corporation existing under an act of the legislature of* "*the State of Illinois*, of the *first part*, and the Racine and Mis- "sissippi Railroad Company, a *corporation existing under an act of* "*the legislature of the State of Wisconsin, of the second part*, wit- "nesseth as follows:" Then follows language of grant of all the powers, privileges and franchises of the Savanna Company to the Racine Company; an assignment of stock, subscriptions, maps, profiles, books, &c., and consolidation of its capital stock, essentially the same as in the contract with the Rockton Company, already considered.

By the laws of Illinois, which constitute the charter of the Savanna Branch Railroad Company, it was not empowered or authorized, in any manner, to transfer to any corporation, domestic or foreign, any of its chartered rights, powers, privileges or franchises; and by the consolidation act, the company was prohibited consolidating with the Wisconsin corporation. Without legislative authority, no corporation has power to consolidate with another; then the Savanna Branch Company had no power to do any of the things which it attempted to do, in, or by the contract now under consideration; nor was the Racine and Mississippi Railroad Company authorized to enter into this contract, or to make any contract as to the subject matter in that contract. It was only authorized to contract with *one railroad corporation* in Illinois, and the railroad of *that one* had to connect at Beloit with its railroad. It is, therefore, obvious that the Savanna Branch

Company did not part with anything—did not transfer anything —did not acquire anything; and that the Racine and Mississippi Company neither parted with, or acquired anything, by, through, or under the contract of date January 23, 1856.

This contract is absolutely void, as being *ultra vires*. Being void, things were not changed, but remained as though that contract had never been made. As nothing passed to the Racine and Mississippi Company, it never acquired any right, or thing, over, or in relation to which, it could exert the least earthly power.

Outside of this contract, there is no pretence that the Racine and Mississippi Railroad Company ever had any power to locate, construct, equip, operate, purchase or lease any railroad or line between Freeport and Savanna, on the Mississippi river. Between these points we see that nothing was granted.

The note in question having been given for an unauthorized purpose, was illegal and void. The following authorities, out of the many that might be cited, fully sustain this position:

Pierce v. *Madison and Ind. R. R. Co. and another Company*, 21 How., U. S., 441.

East Anglian R. W. Co. v. *Eastern Co. R. W.*, 11 C. B., 808.

McGregor v. *The Official Manager of the Deal and Dover and C. Railway Company*, 16 Eng. L. and Eq., 180.

Talmage v. *Pell*, 3 Selden, N. Y., 323.

Leavitt v. *Palmer*, 3 Comstock, N. Y., 19.

Swift v. *Beers*, 3 Denio, N. Y., 70.

Smith v. *Strong*, 2 Hill, N. Y., 241.

Safford v. *Wycoff*, 1 Hill, N. Y., 11.

Hood v. *The N. Y. and New Haven R. R. Co.*, 22 Conn., 508.

Bank of Augusta v. *Earle*, 13 Peters, 519.

Head v. *Providence Ins. Co*,. 2 Cranch, 127.

Perrine v. *Ches. and Ohio R. R. Co*,, 9 How, U. S., 172.

Root v. *Goddard*, 3 McLean, C. C., 102.

Root v. *Wallace*, 4 McLean, C. C., 8.

At this point it may be said that the following propositions are incontrovertible:

1st. That no one of the states of the federal government can authorize or empower a corporation of its own creation to locate, condemn and appropriate private property for a road bed, construct, equip or operate a railroad in any one of its sister states, or *outside* of its own territorial boundaries; but each state possesses the *sole* and *exclusive* power to say what corporation may do these things, or any of them, *within* its own limits, and how and when the same may be done.

2d. That a corporation is a statute creature or being, having the capacities with which it is endowed by statute, and *none other;* that the powers conferred can *only* be exercised as by statute provided; that it can exercise no power which is not *expressly* granted, and such as are absolutely necessary to conserve its own existence, and make effectual the powers expressly granted; or, in other words, to consummate the *object* of its creation.

This is the uniform doctrine of this court, as well as that of Illinois.

Town of Petersburg v. *Metzken*, 21 Ill., 205.
Ill. Conference Female College v. *Cooper*, 25 Ill. 148.
Fitch v. *Pinkard*, 4 Scammon, 69.
Betts v. *Menard*, Breese, 395.
Metropolitan Bank v. *Godfrey*, and cases cited, 23 Ill. 579.

3d. The object of creating the Racine, Janesville and Mississippi Railroad Company, was the location, construction, equipping and operating a railroad and branch railroad in Wisconsin; and the location and construction of a railroad in Illinois was wholly without that object.

4th. That the object of creating the Rockton and Freeport Railroad Company, was to construct a railroad in Illinois, either by that corporation itself, on a line which it should in its discretion

locate, or by such company of Wisconsin as had the right to receieve, by grant, from the Rockton company the right to "construct and use" the railroad authorized to be constructed by the charter of the Rockton company, and which Wisconsin company must have had the right to construct a railroad in Wisconsin, towards Lake Michigan, from the northeastern terminus of the Rockton and Freeport Railroad, as the same should be fixed by the Rockton company—whether at Beloit or at *some other point* on the *north line* of Winnebago County—and it was without the powers of the Rockton company to grant to the Racine company the right to "*construct and use*" the road which it was authorized to construct.

5th. That the Rockton company were authorized to *locate* a line of railroad from Freeport through the village of Rockton to a point on the north line of Winnebago County, and for the road bed, &c., to acquire the necessary land, by voluntary contract or by compulsory proceedings; to determine the amount to be charged for the transportatien of persons and freight upon said road, &c. But this company was not authorized to transfer any of these powers and franchises to the Racine, Janesville and Mississippi Railroad Company, nor to any other company; nor was the last named company authorized to receive or become vested with any of these powers or franchises.

6th. That the Rockton and Freeport Railroad Company has never located any line of railroad; and hence, the point from which it was authorized to construct a railroad on the "*north line of Winnebago County*," has not yet been fixed, and yet may be fixed in the future.

7th. The Savanna Branch Railroad Company had no power whatever for the transfer or transferring any of its rights, powers, privileges, immunities or franchises to the Racine and Mississippi Railroad Company, or to any other corporation on earth; nor had the last named company any right or power to acquire or become

vested with *all* or *any* of the rights, powers, privileges, immunities or franchises of the Savanna Branch Railroad Company; nor was the Racine and Mississippi Railroad Company authorized to consolidate its capital stock with the capital stock of the Savanna Branch Company; but this company was prohibited consolidating its capital stock with the capital stock of the Racine and Mississippi Railroad Company.

8th. The consolidation contract between the Savanna Branch Company and the Racine and Mississippi Railroad Company was void, for the reason that neither company had the power to make the same.

9th. The consolidation contract between the Rockton and Freeport Company and the Racine, Janesville and Mississippi Railroad Company was void: 1st. Because not sealed with corporate seals. 2d. Because the contracting corporations had no authority to do what was attempted to be done by the same.

10th. The Racine and Mississippi Railroad Company never possessed *any power* to *either* locate, *construct*, *equip* or *operate* a railroad in the State of Illinois, unless it acquired that power *by*, *through* or *under one* or *both* of the above mentioned contracts of consolidation. That company never acquired these powers, nor any nor either of them, under, by or through those contracts, or either of them.

We contend, however, that the pleadings admit that the payee corporation had not the power to construct a railroad in Illinois; that it had not consolidated its stock with the Illinois railway corporations; that the note was given to aid that Wisconsin corporation in constructing a railroad in Illinois, and that the plaintiff Cooper knew these facts at and prior to the time when he became possessed of the note in question. But the proof shows, as already said, that Cooper knew that the note was given for this purpose, which, being for an unauthorized purpose, was illegal and void;

and that in the light of the decisions of this court, this action cannot be maintained. The charter of that Wisconsin corporation was a public act, by express words in the charter, and by the decisions of this court, already cited in 21 Howard, 441. The plaintiff is, therefore, chargeable with a knowledge that the payee corporation had no power to engage in the construction of a railroad in Illinois; and as he found that body engaged in such work in Illinois, he should have stayed his hand, and kept his money in his pocket; and cannot now be rewarded for his folly or his negligence in ascertaining details, by a judgment against the plaintiff in error.

IV.

By the verdict, we see that the jury say that they find "*the issue*" for the plaintiff, and then assess his damages. Now, which of the issues did they mean? That of *nonassumpsit*, or the issue to the amended special plea, that the plaintiff had not, at the time he acquired the note in question, or the maturity thereof, any information or knowledge of the facts constituting the defence of failure of consideration of that note? It must, it is apprehended, be conceded that there were at least *two issues* of fact. And if it be held that the question of endorsement of the paper was also in issue, there could have been *no less* than three issues in the case, because there were two special pleas under the statute of Illinois, (which is a rule of practice in the court below,) alleging the *non-endorsement* of the note. The jury, if they found "*the issue*" of *nonassumpsit* for the plaintiff, would naturally assess damages for him, although they did not pass upon any other issues, or *the* other *issue.*

It is impossible, from the verdict, to tell what the jury thought upon the issue made by the replication.

A verdict which does not dispose of *all the issues*, cannot be the

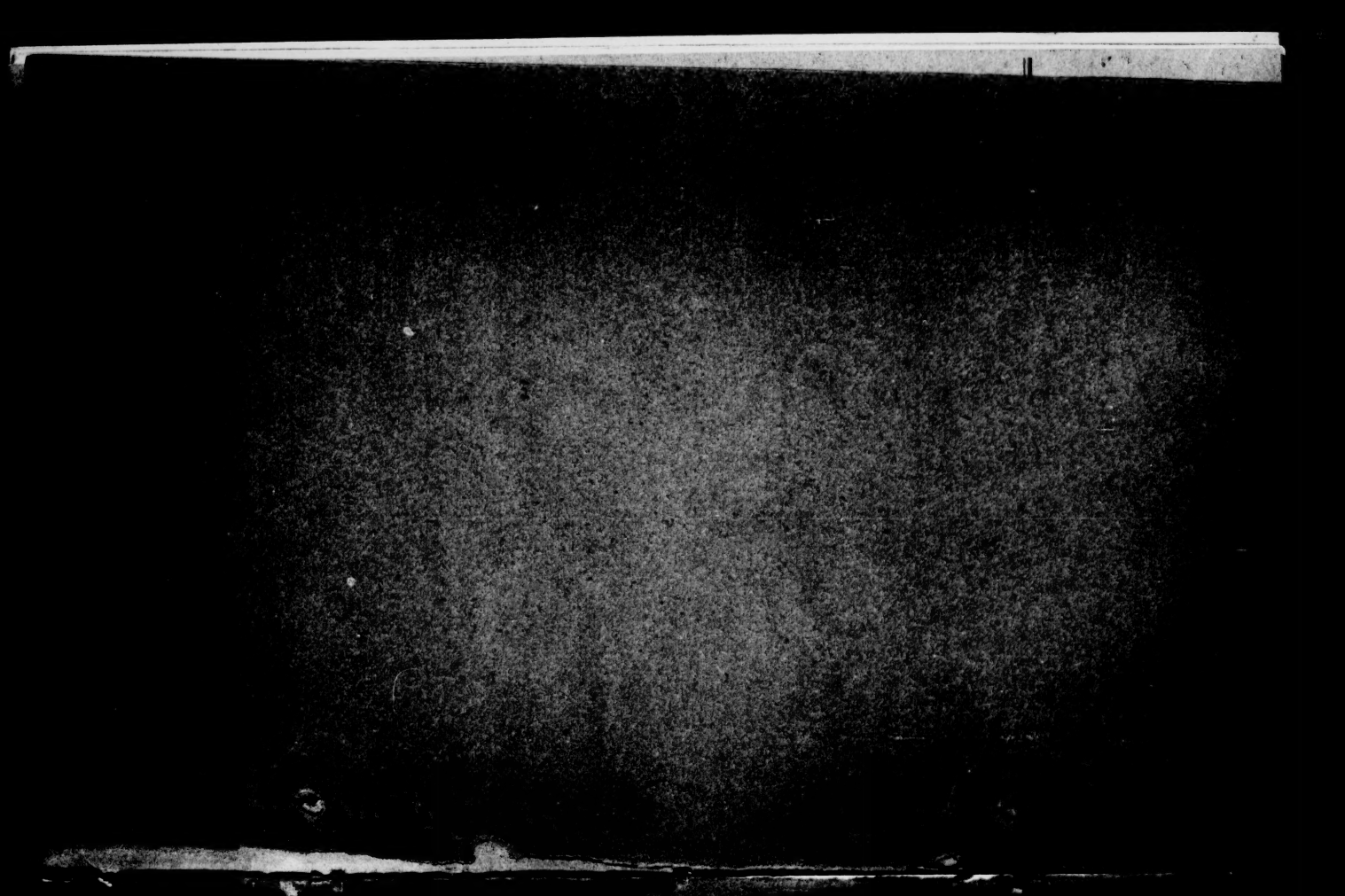
basis of an irreversible judgment, but such judgment is erroneous, and must, on error brought, be reversed.

Garland v. *Davis*, 4 How. U. S. 131.
Patterson v. *United States*, 2 Wheaton, 221.
Fennick v. *Logan*, 1 Missouri, 283.
Middleton v. *Quigley*, 7 Halstead, 352.
Sawyer v. *Kitts*, 4 Stew. & Porter, 365.
Cranch v. *Martin*, 3 Blackford, 256.
Thomson v. *Button*, 14 Johns. 84.
Coffin v. *Jones*, 11 Pick. 45.

We think that the points on the errors assigned, are well taken, and that, for the reasons given, the judgment should be reversed.

MATT. H. CARPENTER,
Attorney for Plaintiff in Error.

J. H. KNOWLTON, *of Counsel.*



Supreme Court of the United States.

DECEMBER TERM, A. D. 1868.

JACOB LABER, - - *Plaintiff in Error,*

VS.

TUNIS COOPER, Defendant in Error.

POINTS, AUTHORITIES AND ARGUMENT

OF

LEWIS UMLAUF,

ATTORNEY FOR

DEFENDANT IN ERROR.

S. Emerson, Book Printer, 148 Dearborn Street, Chicago.

United States Supreme Court.

DECEMBER TERM, 1868.

TUNIS COOPER,

v.

JACOB LABER.

Points, Brief and Authorities of TUNIS COOPER.

Tunis Cooper, *bona fide* assignee, for value, brought suit upon the following Note:

"Know all men by these presents, that I, Jacob Laber of the town "of Rock Grove, in the county of Stephenson and state of Illinois, "being justly indebted to the Mississippi and Racine Railroad Com- "pany in the sum of thirty-seven hundred dollars for value received, "do hereby promise to pay the said Racine and Mississippi Railroad "Company or order, the sum of thirty-seven hundred dollars at the "expiration of five years from the tenth day of May, A. D. 1856, to- "gether with interest thereon at the rate of ten per cent. per annum, "payable annually on the 10th day of May, in each year after the "date hereof, principal and interest payable at the office of said Com- "pany in the city of Racine, in the state of Wisconsin.

"In witness whereof, I have hereunto set my hand this sixth day "of May, in the year of our Lord one thousand and eight hundred "fifty-six." (pr. rec. p. 27.)

"JACOB LABER."

The Declaration consists of two special and the common money counts. (pr. rec. p. 3–6.)

Plaintiff in Error interposed four pleas: the general issue, one amended special, and two statutory pleas. (pr. rec. p. 7, 15–21.)

Replication to amended special plea. (rec. p. 21.) Trial before a Jury, the Hon. Judge Drummond presiding, and verdict for Defendant in Error for amount due upon Promissory Note. A motion for new trial being overruled, judgment was rendered upon the verdict.

Plaintiff in Error brings the cause before this Tribunal for review, upon supposed errors in the Record.

The Errors assigned may be classed into two divisions, to wit: into

I,—Errors upon Matters in Form, and into

II,—Errors upon the Merits of the Case.

The attention of this Honorable Court is respectfully invited to the consideration of the Errors within the purview of the first division.

Plaintiff in Error says his amended special plea (rec. p. 15–19,) is *double*, presenting two distinct issues, to wit: *fraud in the execution of the Note*, and *failure of consideration*, and that Defendant in Error traversed only the *issue of failure of consideration* and consequently admitted the *issue of fraud*. The Answer to the assertion is,

(1.) The Plea is not double.

(2.) If by a distant, or indirect intendment the plea might bear a construction of duplicity, it will be construed strictly against the pleader, especially where *his intention to mislead and deceive is apparent.*

(3.) If the plea be double in fact, presenting two direct and distinct issues, a replication will be considered waived after verdict, when at the trial the Defendant offered evidence to establish the truth of his unanswered issue.

(4.) If double, and the Defendant himself treated the plea as a

single issue, he cannot complain, especially when at the trial he had the benefit of his duplicity.

(5.) If duplicity be not objected to in the Court where the issues were tried, and where the informality *might have been remedied*, the defect is cured after verdict by the doctrine of intendment, and by the statute of jeofails.

The allegations, in their several individuality, or taken together in their commixture, have one common parent, draw life from one fountain, rest upon one foundation, speak the same gravamen, to wit: *representations made*, that were or proved to be untrue, and "*therefore and by means thereof the consideration for the said Promissory Note has wholly failed.*" Such is the result of the pleader's reasoning, the conclusion at which he arrives in his plea. (14th, 15th, 28th and 29th lines on page 19 of record.)

It is the supposed *untruth* of the several *representations*,—not their *assertion*, which forms the foundation of the plea. The *untruth* is the *fraud*, and the *fraud* is the *failure of consideration*. The very nature of the case, and the language of the plea show conclusively that FRAUD and FAILURE of CONSIDERATION are co-existing, dependent, component parts, which, united, form the individuality of the plea. If the plea averred *no false representations*, then there could be no fraud; and if no fraud, the consideration *would stand good and unassailed*. The plea resolves itself into the following, logical analysis, to wit: *fraud*, the *cause; failure of consideration*, the *effect*. Expunge *fraud*, the cause, then *failure of consideration*, the effect, must vanish with it *pari passu*.

Without its effect the cause is dormant, passive, lifeless, and cannot at law form the foundation for prosecution or defense. The *cause* and *effect* are requisite to form the issue of the plea,—they cannot be divorced.

The Court will also inquire into and consider the intention of the pleader. The *amended* is substantially the same as the *original* plea, except that in the *amended* plea the traverse of the indorsement of the Note is omitted. A demurrer was sustained to the original plea. *Duplicity* was *one of the grounds* of demurrer. (rec. p. 13.) The pleader dropped the averments denying the indorsement, and reproduced the *original* for his *amended* plea. It may reasonably be

inferred from the pleader's conduct, that he intended his amended plea to be free from the objections urged against it by the demurrer. A contrary intention can and ought not to be inferred, because it would accuse the pleader of disrespect to the Court, of a design to *mislead* and *deceive* his opponent.

Again, if the Court would allow or consider the same obnoxious elements in successive amended pleas, the province of pleading would suffer violence, degenerate into an undignified and illogical course of perpetual bushwacking. *The pleader intended to present a pure and single issue by his amended plea.* His intention is apparent throughout the subsequent stages of the cause. Did he demur to the replication? or rule his opponent to reply to the double issue of his plea? Did he object to the informality before or at the trial of the cause? *Why did he offer the volume of testimony to prove a fact, which he considered* ADMITTED?

The replication that "this Plaintiff did not have any knowledge, or information, or notice whatever of the said facts (not fact) averred in Defendant's said plea as constituting the said defense of failure of consideration," etc., effectively traversed the plea. The traverse would have been as complete and direct, if instead of *failure of consideration* the averment of *fraud* had been inserted. The replication traversed and put in issue *all the facts* alleged in the plea, and gave the plea the appellation which the Defendant *had given it.* If the replication had traversed the plea as a plea of fraud, the *same facts* would have been put in issue. If *two* replications had been interposed to the plea, one to the *fraud*, the other to the *failure of consideration*, each would have put in issue *all the facts* averred in the plea. The proofs under the *one* would necessarily be *the proofs under the other.* And in this sense the issue was understood and acted upon by both parties litigant, and by the Court.

Plaintiff in Error therefore stands adjudged by his own acts. His efforts at the trial to sustain the issue tendered by the plea, were strenuous, but abortive. The large volume of testimony, which forms the greatest part of the record in the case, was offered by him for the *express purpose* to prove *the fraudulent representations* averred in the plea,—*the very fact of* FRAUD which he now contends not to have been at issue. If the replication *admitted* the issue of fraud, then no *proof* thereof was requisite at the trial. The Defendant is

estopped from saying, that the fact of fraud was not in issue. No defect in the pleading was observed in the Court below; silence prevailed; nothing then existed to trouble the imagination.

It is an established principle in pleading, that every plea should be *single*, and present but *one defense*.

Chitty's Pleadings, Vol. I., 532.
Gould's Pleadings, Chap. VII., 49,

and that if a plea carries on its face two intendments, *that* shall be taken against the Defendant, which is most unfavorable to him.

Chitty's Pleadings, Vol. I., 515.
United States *vs.* Linn, 1 H. 104.
Savage *vs.* Goe, 3 W. C. C. 140.
Mower *vs.* Burdick, 4 McL. 7.

And if a Defendant go to trial upon a replication, which he insists is not a full answer to his plea, without demurring, or moving to strike it from the files, he will be held to have admitted its sufficiency.

Ohio & Miss. R. R. Co. *vs.* Middleton, 20 Ills. 629.
Coutch *vs.* Barton, 1 Morris, 354.

"The doctrine of intendment after verdict, Chitty says, is founded "on the common law, and is independent of any statutory enact- "ments. The general principle upon which it depends, appears to "be, that where there is any defect, imperfection or omission in any "pleading, whether in *substance* or in *form*, which would have been "a fatal objection upon demurrer, yet, if the issue joined *be such* as "*necessarily required on the trial proofs of the facts* so defectively, "or imperfectly stated, or omitted, and without which it is not to be "presumed that either the Judge would direct the Jury to give, or "the Jury would have given the verdict, such defect, imperfection or "omission, is cured by the verdict." And further, "the expression "*cured by verdict* signifies that the Court will after a verdict presume "or intend that the particular thing, which appears to be defectively "stated, or omitted in *the pleading*, was duly proved at the trial."

I. Chitty Pleadings, 673, and authorities there cited.

If the proofs had not been preserved in the record, the Court, upon

the doctrine of intendment, and under the issue presented by the plea and replication, would presume that all the facts averred in the plea were proved or attempted to be proved at the trial. In the case at bar, *certainty* takes the place of presumption, for the testimony, by which the Plaintiff in error on the trial attempted to prove the facts averred in the plea, is fully preserved in the record, and is before the Court. See the testimony of the witnesses Benjamin Dornblazer, on page of record 32–66; Samuel Davis, 45–59; Emanuel Stover, 33–41; T. W. Merrill, 41–45; and of Plaintiff in error, 126–134. This being the case, what cause has the Defendant to complain? Surely no other than that he could not prove his plea, *it being untrue in point of fact.*

The Defendant raises also a question upon the statutory pleas. "*Was or was not the question of indorsement in issue?*"

The reply to this interrogatory is: *It was in issue.* Had it not been in issue *no proof* thereof would have been required at the trial. The drowning man seizes at a straw.

No replications were interposed to the statutory pleas. It is ingeniously said, that "if the conclusion by verification was wrong, the "Plaintiff should have demurred for that cause; not having demur-"red, the allegations of the plea could and should have been traver-"sed." This declaration indirectly admits the wrongful conclusion of the pleas. It likewise shows that the Plaintiff, by his conduct, has not manifested great taste for special demurrers and immaterialities. Plaintiff, however, in open court requested Defendant to amend the conclusion of his statutory pleas, to the country. Defendant then considered an amendment useless toil, "as the fact of indorsement had to be proved at the trial," whether the conclusions were by verification or to the country. (This fact does not appear of record, its immateriality probably is the cause of its omission.) But now the wind waves in a different direction, and the conclusion all at once is of vital importance. *Consistency where is thy blush?*

Under the statute law of Illinois, the execution of negotiable instruments and the transfers thereof cannot be inquired into, unless the same be denied by plea, verified by affidavit. In Grier *vs.* Gibson, 36 Ills. 522, the Court says, "the assignments (of notes) were "not required to be proved as there was no affidavit filed denying

"them." Again, in Frye *vs.* Menkins, 15 Ills. 15, 341, the Court says, "it (statute) provides that a defendant shall not be permitted to "deny on trial the execution or assignment of the instrument upon "which the suit is brought unless the denial is interposed by plea, "verified by affidavit." The law presumes the assignment of negotiable paper to be for value and in good faith. The statute provides a remedy to rebut that presumption.

The statute is silent in respect to the form of such pleas. They are, therefore, in that respect governed by the established rules of pleading. Pleas in bar must *either deny* the facts alleged in the declaration *or confess and avoid* them. Pleas, which *merely* DENY the material allegations in a declaration, must conclude to the country.

I. Chitty's Pleadings, Chap. VII. § 13.
Service *vs.* Heermance I Johns, 91.

Pleas of confession and in avoidance *must conclude with verification*, to give the Plaintiff an opportunity of traversing the new facts introduced and set up in avoidance, either by a direct denial of them, or by the introduction of other facts in their avoidance. Test these statutory pleas by the touchstone of these rules of pleading, firmly planted and universally recognized, the result is and must be, that their conclusions should be to the country. In Stephenson *vs.* Bowers, 1 Harr. 16, the doctrine that a plea denying the assignment of a bond, should conclude to the country, is recognized. But Defendant contends "although the conclusion be wrong, yet unless demurred or "replied to, the facts alleged are admitted."

The position is simply absurd; for how can a Plaintiff admit the truth of a plea, which merely denies a material averment in the declaration, in the face of and contrary to the positive averment in the declaration? The declaration avers the indorsement of the Note, the statutory plea denies this averment. The issue is thus formed and is complete. It is simply impossible for the Plaintiff to admit the truth of the plea by mere silence, for the plea denies the declaration and the *plea stands denied by the declaration.*

But if Plaintiff in error intended to be the tender guardian and vigilant defender of immaterialities, why did he not pay homage to their presence and demands in the court below? Were they passed by unheeded and unknown? or regarded as too insignificant in that

form? What mystic power has touched the fostering impulse, and transformed their insignificance into such colossal stature, that the consideration of this court is implored in their behalf?

Nature possesses a curative power, which, in course of time, heals and mends fractures, bruises, incisions, and many numerous ailments and defects, to which the physical world is subject. So the law, in its majesty, while balancing on time, mends and adjusts infractions upon the ethics of its logic, which inadvertantly, and alas, too often occur to mar its symmetry and harmony.

Thus where parties go to trial on a plea, *which concludes with a verification* and *without replication*, the mispleading is cured after verdict.

I. Chitty's Pleadings, 673.
Coan *vs.* Whitmore 12, Johns, 353.
Glenn *vs.* Copeland 2 Watts & Serg, 261.
Brazzle *vs.* Usher, Breese, 14.
Sullivan *vs.* Dollins, 13 Ills., 88.
Hendricks *vs.* Seeley, 6 Conn., 176.

This disposes of the technical errors, which are for the first time raised in this court, but which should have been urged in the Circuit Court, if considered at all.

II,—Errors Assigned upon the Merits of the Case.

a, Indorsement of Note.

Was or was not the note transferred before maturity, so as to vest the legal title thereof in the assignee?

At the time Defendant gave the note, he, to secure it, executed also his mortgage upon certain real estate, and delivered both note and mortgage to the Racine and Mississippi Railroad Company, the payee. The payee, before offering the note and mortgage for sale, gave its bond for the same amount, and attached and fastened all three together as one security.

It was the custom of the Railroad Company, when parties subscribed and purchased stock and could not pay for it in cash, to take in place of it their notes secured by mortgages. In this manner the

Company accommodated a large number of anxious purchasers, and at the same time placed itself in a condition to construct and equip its road with the funds realized from the sale of the securities, which securities were known in the public markets by the name of Racine and Mississippi Railroad Farm Mortgage Securities, and of which there was a large number, a thousand or more.

Arranged and connected in the manner aforesaid, the Company placed them, as was intended and understood by both maker and payee, on the public market for sale. Agents were sent to the principal money marts in the United States and in Europe to effect ready cash sales. When thus thrown upon the market, Defendant in error purchased the security now in question.

The Company's bond, (rec. p. 134–135,) contained a clause of assignment of the note and mortgage in these words: "and for the bet-"ter security of such payments being made to the holder hereof, the "said Company have assigned and transferred, and by these presents "does assign and transfer to the said holder of this bond a certain "note for the sum of three thousand seven hundred dollars, executed "by Jacob Laber, Stephenson county, together with a mortgage giv-"en collateral to and for the purpose of securing the payment of the "same, dated on the sixth day of May, 1856, payable in five years "from the tenth day of May, 1856, with interest at the rate of ten "per cent. per annum, which said note and mortgage are hereto ap-"pended and are transferable in connection with this bond, and not "otherwise to any parties or purchasers whomsoever. And the said "Company do hereby authorize and empower the holder of this bond "at any time, in case said Company shall fail to perform any of the "foregoing stipulations, by neglecting to pay either principal or in-"terest on this bond when the same shall become due, to proceed "and foreclose the said mortgage, or take such other legal remedy "on said note and mortgage against said mortgagor or against this "Company on this present bond, or on both, as shall seem proper "and expedient to said holder hereof."

This assignment, it is contended on the part of the Defendant, is not such an assignment of the note as to vest the legal title thereto in the assignee, because under the statute law of the State of Illinois, the indorsement should be made upon the note itself, and because it is evident from the language employed, that the payee only intended to convey the equitable title to the note.

Both positions are glaring fallacies. The fallacy of the latter is apparent from the tenor of the assignment. The language employed will convince the most skeptic legal mind that the payee intended to, and did convey the legal title to the assignee. If the payee intended only to convey the equitable title, no manner of written assignment was necessary; a verbal pledge and delivery of the note and mortgage would have vested in the assignee the equitable title thereto. The language "the Company have assigned and transferred, and by "these presents does assign and transfer to the said holder of this "bond a certain note," etc., leads to the irresistible conclusion that the Company intended to, and did assign and transfer all the right and title at law and in equity which it had in and to the note and mortgage. The words employed constitute a general assignment and transfer, without reservation or qualification. The clause, "and are "transferable in connection with this bond and not otherwise, to any "parties or purchasers whomsoever," is seized upon by Defendant as a clause of limitation and restriction. This forced construction could in no wise impair the rights of the first assignee, because the restriction, as placed, is only intended to operate upon a second, or successive transfers, and not upon the one from the payee to first indorsee.

One glance beyond the mere appearance of the fog, which seems to blur the vision of Defendant, will reveal in brighter colors the real sense and attitude of the original parties. The note, mortgage, and bond were connected and fastened together, so that the trio had to travel together in fellowship, wherever the commercial world might order. The assignment of the note did not appear on the face, or back of the note, but in the Company's bond, therefore the one could not be separated or divorced from the other. The note could not make its expected evolutions or transitions in the commercial world, because the *bond* contained *its legal passport*. This being so, the Railroad Company, by the supposed restrictive clause, expressed and declared only the sense or conclusion of law. In the absense of this clause, the law would have required the bond and note to remain and travel together, in order to preserve to the note its negotiability. The bond could not be in *one place*, and the note *in another*. So far as the assignment is concerned, this clause is mere surplusage, *a conclusion of law*.

It is to be borne in mind that the note is made by a citizen of

Illinois to a Wisconsin corporation, payable in Wisconsin, and is therefore a *Wisconsin note* and governed by the laws of Wisconsin and not by the laws of Illinois.

Andrews *vs.* Pond, 13 Pet. 65.
Brabston *vs.* Gibson, 9 H. 263.
M'Candlish *vs.* Cruger, 2 Bay. 377.
Tyler *vs.* Trabue, 8 B. Mon. 306.
II. Parson's Contracts, 95–96.
Hayden *vs.* Davis, 3 McL. 276.
Bell *vs.* Bruce, 1 H. 169.
Ladd *vs.* Delany, 1 Cr. C. C. 583.
Cox et. al. *vs.* The U. S., 6 Pet. 172.
Tompson *vs.* Ketcham, 4 John's 285.
Mason *vs.* Dousay, 35 Ills. 424.
Lewis *vs.* Headley, 36 Ills. 433.

The assignment of the note was made in Wisconsin, and is governed by the *laws of Wisconsin*. The indorsement of a promissory note is a new contract and is governed by the *lex loci*.

Burrows *vs.* Hannegan, 1 McL. 315.
Bank of Illinois *vs.* Brady, 3 McL. 268.
Dundas *vs.* Bowler, ibid. 397.
Orr *vs.* Lacy, 4 McL. 293.
Cox *vs.* Adams, 2 Kelly 158.
Hatcher *vs.* M'Morine, 4 Dev. 122.
Walker *vs.* Forbes, 25 Ala. 139.
Davis *vs.* Clamson, 6 McL. 622.
Lenox *vs.* Wilson, 1 Cr. C. C. 170.
II. Kent Com. 567.
Holbrook et. al. *vs.* Hibbard et. al., 2 Scam. 465.
Slocum *vs.* Pomeroy, 6 Cranch 221.
Aman *vs.* Sheldon, 12 Wend. 439.
Cranch *vs.* Hall, 15 Ills. 264.
Chitty on Bills, 168.

This being the law of the land upon the fact of assignment, it follows that the validity and sufficiency of the assignment is subject to, and must be tested and measured by, the laws of Wisconsin, where the assignment was made. If by the laws of that state the assign-

ment of the note was sufficient to vest the legal title thereto in the assignee, *the transfer is valid and legal in every other forum.*

The question then arises: Was or was not the Plaintiff, by virtue of the assignment in the payee's bond, vested with the legal title of the note? The highest tribunal in the State of Wisconsin has adjudicated the point under consideration in the affirmative, and its decision is the law upon the subject in Wisconsin.

In the case of Crosby *vs.* Raub et. al., 16 Wis. 623, the question was brought before that court and fully considered. The opinion of the Court, by Justice Paine, in that case is here reproduced *verbatim* for the convenience of this Honorable Court. It is as follows:

This action was brought to foreclose, what is commonly called, a farm mortgage. It was given to the Milwaukee and Mississippi Railroad Company, and the note given in connection with it, was made payable to that Company or order. It is conceded that it was transferred to the Plaintiff before due, for value, and that Plaintiff had no notice of any equitable defense. But on the trial the Defendant offered in evidence, a defense set up in the answer founded upon alleged faults and fraudulent representations by the agents of the Company in procuring the mortgage. This was excluded on the ground that such facts would constitute no defense against the Plaintiff, he being a *bona fide* holder for value.

This ruling is alleged to be erroneous.

And it is claimed that this note never was transferred to the Plaintiff within the rule of mercantile law, so as to transfer the legal title, and that therefore the equities between the original parties may still be shown in defense. This position is based entirely upon the mode of transfer, which was as follows: The Company executed to the Plaintiff its own negotiable bond payable to him or bearer and attached the note to it, reciting in the bond that they thereby transferred the note and mortgage to the Plaintiff as security, and that both should be transferable in connection with the bond and not otherwise.

The sole question is, whether this was a sufficient indorsement of the note within the law merchant, to pass the legal title.

It must be admitted that the Company did not assume the liability of indorsement. But this is clearly not necessary to transfer the note.

Thus, a payee may indorse without recourse,—which transfers the note, though he assumes no liability whatever.

So he may transfer the title by signing on the back, or attached to the note a guarantee of the payment or collection, which is an entirely different contract from that of an indorser. And even though he shall fail to bind himself as guarantor by not complying with the statute of frauds, there is no rule for doubt that the title to the note would pass.

In every case of a sale of negotiable paper, there are two objects to be accomplished: First, to pass the title to the purchaser; and second, to fix the relation of the vendor to the paper after the sale. The latter may release him from any liability, or charge him with the ordinary liability of indorser, or with the unconditional liability of a guarantor of collection. But it is immaterial which, so far as the accomplishment of the first object is concerned.

In either case, the name of the payee on the paper with the intent to pass the title, has that effect, whatever may be the nature or fate of the balance of the contract. Judge Bronson, in Miller *vs.* Gaston, 2 Hill 192, states the fact incidentally that a guaranty as well as an indorsement may have the effect of transferring the legal title to the note. There are but few authorities directly in point, and those are somewhat in conflict. They are all mentioned in Parsons' on Notes and Bills, Vol. II., p. 135, noted. The author gives it as his opinion, that on principal, a note transferred by guarantee remains negotiable. And those cases which sustain that conclusion, seem founded upon the better reasoning. If an indorsement without recourse transfers the title, because the parties so intended, an indorsement with guarantee should have the same effect, and that whether the guarantee, as such, stand or fall.

It being established, then, that it is not necessary to a transfer of title, that the vendor should assume the technical liability of indorser, but that the parties may contract on that subject as they please. Can there be any room for doubt, that if the bond of the Railroad Company had been actually written on the back of the note, it would have been a sufficient indorsement to transfer the title within the law merchant; I can see none whatever. Stronger language could not be used, showing an intent to pass the title to the note, to be held as collateral security for the bond, and that it was designed to circulate as negotiable paper, transferable by delivery with the bond, which the Company must be assumed to have known could not have been done without being first indorsed by it.

The intent, then, to pass the title and make the note transferable by delivery afterwards, as a note payable to order and only indorsed by the payee, is beyond question. And this contract, like all others, must take effect according to the intent of the parties, if it is sufficient in law to express that intent. And the fact that the parties contracted for an absolute liability by the vendor, evidenced by a distinct negotiable instrument on the back of the one transferred, cannot, upon any rational principle, be held to distinguish the case so far as the mere question of a transfer is concerned, from a case where they contract for no liability or for the conditional liability of an indorser, or the absolute liability of a guarantor.

I conclude, then, that if the bond had been written on the back of the note, it would have been fully sufficient to pass the legal title within the law merchant.

The only question remaining is, whether the fact that it was on another paper attached to the note, prevents this effect. This must depend upon the question whether there is any inflexible rule of the mercantile law, requiring an indorsement to be on the identical paper on which the note was originally written.

That there is any such, certainly cannot be maintained. All the cases where the question is raised, and all elementary writers, concur in saying that an indorsement may be on another paper attached to and made a part of the note; such paper is called an *allouge*. And it is true that the usual reason stated for using such a paper, is that there is no longer room on the note to make the indorsement. But this does not mean that there must be an actual physical impossibility to write the indorser's name on the original paper.

On the contrary, the usage of the mercantile law is, as Chief Justice Marshall says, "founded in convenience," and all that its spirit or its letter requires is, that when it is inconvenient to write on the back of the note the real contract between the vendor and the vendee, and which if written would pass the title, it may be written on another paper and attached to it with like effect. Thus, suppose the consideration for the ordinary indorsement was a sale of real estate, and the parties desired to express the consideration. It might be wholly unnecessary, yet no one could question their right to do so. Suppose the description of the real estate was too long to be written on the back of the note, and they should write the indorsement on another paper, containing the full description, and attach it to the note, could it be for a moment contended that it would not pass the title? I think not.

Yet if not, it must be because the spirit of the mercantile rule is as above stated. And if such is its spirit, the particular reason which makes the contract too long to be written on the note is wholly immaterial. All that can be material is, that it would be a contract which, if on the note, would pass the title, and that for some reason it is inconvenient to write it on the note. Where this is true, the transfer may be effected by writing it on another paper attached to the note.

All that is shown by the authorities relied on by the Appellant is, that where a note payable to order has never been indorsed by the payee, within the meaning of the law merchant, the legal title has not passed, and the equities between the original parties are not cut off. But no case was cited, and I think none can be found, to show that the name of the payee on another paper attached to the note, and plainly intended to operate as an indorsement so far as to transfer the title, would not have that effect.

There are cases showing that an assignment of a number of notes at once, by a separate paper never attached to either of the notes or intended to be, is not an indorsement in the law merchant.

French *vs.* Turner, 15 Ind. 59; Hopkirk *vs.* Page, 2 Brockenburg 41.

But such a transfer is so widely different from the present, and there was really so little ground to claim it was an indorsement, that while the correctness of those decisions is unquestioned, it is equally clear that they are not applicable here. On the contrary, Chief Justice Marshall based his conclusion upon the fact that the mode of transfer there in question, separated the "evidence of ownership from the bill itself;" implying plainly that the same conclusion would not be true, where this evidence was attached to the note so far as to travel with it wherever it might go.

I have not deemed it necessary to enter into any detailed examination of authorities. I have stated the principles which seem fairly to be derived from them; and although no case is found where a contract precisely like this has been passed on, it seems to me fully within those principles.

The rules of the mercantile law are based upon convenience. For this very reason they do not harden so as to impose upon an age the mere shapes and forms of business which may have been in vogue in another. This would be extremely inconvenient. Those rules are therefore flexible, and adapt themselves to the changes of progress and experience, so as to be always founded on convenience. No better illustration of this can be given than is furnished by the history of negotiable bonds like the one in connection with which this note was transferred. Bonds and other sealed instruments were not negotiable within the law merchant. They were always open to any defense existing between the original parties. But in the great increase of corporations, who became borrowers in the money markets of the world, it was found that their bonds were performing the same functions as negotiable paper, and that the interest and convenience of the mercantile public required that they be governed substantially by the same rule. This rule has accordingly been established. See opinion of Justice Cole in Clarke *vs.* Janesville, 10 Wis. 188, and cases cited.

It would be an extraordinary departure from the spirit of those decisions which held that these bonds, though in form not within the law merchant, were yet within its reason and should be entitled to its protection, if we should now hold that by connecting one of them with a note which was negotiable within the law merchant, the latter should be taken out of it. Judgment affirmed.

The original assignment of the note being good, for value, and without fraud, or notice of fraud in the execution of the note, the Plaintiff, could in his own name sue for and recover the amount of the note; and he could recover under the common money counts.

Gilmore *vs.* Nowland, 26 Ill. 205.
Johnson *vs.* County of Stark, 24 Ill. 92.
Nickerson *vs.* Babcock, 33 Ill. 374.
II. Greenleaf on Ev., § 112; and numerous authorities cited.
Page *vs.* Bank of Alexandria, 7 Wheat, 35.
Pierce *vs.* Crafts, 12 Johns, 90.
Penn *vs.* Flack, 3 Gill & Johns, 369.
Ellsworth *vs.* Brewer, 11 Pick, 316.
State Bank *vs.* Hurd, 12 Mass. 172.
Hodges *vs.* Holland, 16 Pick, 395.
Wild *vs.* Fisher, 4 Pick. 421.
Ramsdell *vs.* Soule, 12 Pick, 126.
Manufacturing and Banking Co. *vs.* Myers, 7 Halst. 141.

In addition to this assignment the payee, by its President, afterwards and before maturity, indorsed the note in blank.

The circumstances under which the blank indorsement was made, are given by the testimony of the Hon. Henry S. Durand, the President of the Company, on pages 24 and 25 of Record, as follows:

"I was president of the Racine and Mississippi Railroad Company "from 1852 to 1865. I remember the circumstances attending the "indorsement of this note. These notes when they were first sold "by the Company, there was a bond attached to them, embracing as-"signment; it was supposed to be all that was necessary to give to "the purchaser a legal title. It was afterwards found by the statute "of Illinois, that negotiable paper must have the indorsement of the "payee upon the back. When that fact came to the knowledge of "the Company, they from time to time brought their papers to be "indorsed, and it was under those circumstances that the indorse-"ment was made. But most of these notes, perhaps some were in-"dorsed at the time they were sold, but many of these notes were "indorsed afterwards, to perfect the title. I was authorized to nego-"tiate these securities. The power was granted to me by the Board "of Directors. I negotiated these securities on behalf of the Com-"pany."

Question by the Court. Well, when it was found that there was this defect, I understand there was no additional authority by the Board of Directors given you?

"I think there was no action upon the subject by the Board of Di-"rectors after this defect was discovered. It was *assented* to by the "majority of the Directors, that no further action was necessary. I "repeat that the authority for indorsing these notes was conferred "upon me by the Board of Directors, as I have stated, as well as the "power to sell them, and negotiate them. The subject was talked of "in the Board of Directors, and it was thought by the Directors that "no further power was necessary. I was authorized to sell and "needed no further authority to perfect them."

It is admitted by Defendant that this technical indorsement was in compliance with the statute and commercial law on the subject, but he seemingly contends that it was made by the President of the Com-

pany without authority. This then leads us to investigate the power of the president to indorse the note.

Further reference to the testimony of the Hon. Henry S. Durand, the president of the company, will throw additional light on this subject. He testifies on page of Record 139, as follows:

"*Q.* About how many notes and mortgages of the description of "the note and mortgage in question did you indorse while you were "president of the Racine and Mississippi Railroad Company?"

"*A.* How many?"

"*Q.* Yes, sir."

"*A.* I should think a thousand. I don't know as there were as "many as that, but a large proportion, I should think a thousand of "them."

"*Q.* When did you make the first indorsement?"

"*A.* I could not say."

"*Q.* About when and in what year?"

"*A.* Well, I should say the winter of 1857 and 1858."

"*Q.* How long did you continue to make them after that time?"

"*A.* Well, I should think for three years, perhaps longer."

"*Q.* Did the Board of Directors know of that fact?"

"*A.* They did, sir." (On page of Record 140.)

"*Q.* Is the manner in which you indorsed this note, the ordinary "or usual way in which these indorsements were made?"

"*A.* It is."

"*Q.* Did the Board of Directors ever protest against your acts— "against these acts of indorsing these papers?"

"*A.* They never did." (And on page 142 of Record.)

"*Q.* By the Court. The question is, what he (the witness) can "say as to the knowledge possessed by the Board of the indorsement "of these notes, such testimony is always proper?"

"*A.* I will state in answer to that, I have done it in repeated "instances on the table where the Board was in session."

The evidence referred to establishes three facts, namely:

1, The President (as financial agent of the company,) had *original* express authority to sell, negotiate and endorse these papers. Record page 24 and 25, where in addition to the above the following testimony appears:

"Cross Ex. *Q.* You say you have negotiated these securities for "the Racine and Mississippi Railroad Company, and you considered "this indorsement part of your authority?

"*A.* I did, sir. It was granted me by the Board of Directors. I negotiated these securities on behalf of the company."

2, The President had original authority by implication of law, for he made the blank indorsements at the time when, in the room where, the Directors were in regular session, and on the table around which they were seated, with their *cotemporaneous knowledge and consent.*

3, A subsequent ratification.

Corporations aggregate act through their agents or officers. The payee—corporation appointed its president its *financial agent to sell and negotiate* these farm-mortgage securities. He sold and negotiated a *thousand or more* of them for the corporation, and among that number, the one under consideration.

Upon the hypothesis that the original assignment failed to convey the legal title of the note, the question presents itself: Was or was not the President as such *financial agent* invested with the power to perfect the transfer thereof, by technical indorsement?

Pursuing the literal sense of the word "*negotiate*," it follows that it embraces and includes a *passing* or transfer, as well as the prerequisite condition of *agreeing* to pass. This sense of the word clearly appears when it has reference to negotiable instruments. A reference to Webster will preclude and silence an adverse conclusion. The eminent linguist defines the verb as follows: "To *sell*, to *pass*, to *transfer*, for a valuable consideration; as to negotiate a bill of exchange."

It follows, therefore, that the President of the Company had *express original* authority to sell, assign and transfer the note in question. This general authority includes the power to *perfect* a transfer originally defectively made.

It is not necessary to inquire whether this grant of power was conferred in writing, since a *parol authority* for *that purpose* is *sufficient.*

Bank of Columbia *vs.* Patterson, 7 Cranch, 299.
Mech. Bank of Alexandria *vs.* Bank of Columbia, 5 Wheat. 326

Fleckner *vs.* Bank of United States, 8 Wheat. 338.
Bank of United States *vs.* Dandrige, 12 Wheat. 64.
Bank of Metropolis *vs.* Gattschlick, 14 Pet. 19.
Fanning *vs.* Gregoire, 16 How. 524.
Badger *vs.* Bank of Cumberland, 26 Maine 428.

Nor is it necessary to prove the grant of power by a formal vote of Directors.

Tapping *vs.* Bickford, 4 Allen (Mass.) 120.
Tollbridge Co. *vs.* Betsworth, 30 Conn. 380.

The President made the blank indorsements with the knowledge and consent of the Directors. The law, therefore, *implies* the power, for, as Chitty says: "a special authority to draw, indorse or accept by procuration is not necessary; the law may infer an authority from the general nature of certain acts *permitted* to be done; and *usual employ* is evidence of a general authority." Chitty on Bills, 31.

Justice Story said: "If officers of a corporation openly exercise a power, which presupposes a delegated authority for the purpose, and other corporate acts show, that the corporation must have *contemplated* the legal existence of such authority, the acts of such officers *will be deemed rightful*, and the delegated authority *will be presumed*."

Bank of United States *vs.* Dandrige, 12 Wheat. 79, also
Angell & Ames on Corporations § 139,
Redfield on Railways, § 169.

It is also evident from the facts and circumstances of the case, that the acts of the officer were *ratified* by the corporation. The Directors themselves in open Board requested their President to make similar indorsements.

The directors of a corporation *may* ratify the unauthorized acts of an agent, which are within the corporate powers of the corporation; and such ratification may be inferred from *acquiescence* merely.

Hoyt *vs.* Thompson, 19 N. Y., (5 Smith) 207.
Tenney *vs.* East Warren, etc. Co., 43 N. H. 343.

A ratification is equivalent to previous authority. No maxim is better settled in reason and law, than *omnis ratihabitio retrotrahitur, et mandato priori acquiparatur.*

Angell & Ames on Corp. § 304, and numerous authorities there cited.
I. Parsons on Contracts, 44, and authorities there cited.
Chitty on Bill, 32, and authorities under Note I.

It is not known, for it is impossible of proof, nor is it of any importance, whether the note in question was the *first* or *last* of the thousand that were indorsed by the President of the Company. It is quite enough to know that the President, from time to time, in the course of *three consecutive years*, indorsed fully one thousand of these notes to perfect "their original assignment," with the *knowledge* and *consent* of the Board of Directors (pr. rec. p. 139, last line) without objection (pr. rec. p. 140, 11th line,) with the mutual understanding on the part of the Board of Directors and the President of the Company, that it was *right* and *proper* that these blank indorsements *should* be made to *perfect*, and give to the holder the legal title, for which he had paid his money—that the President *already* possessed *sufficient* power to indorse the same; that no further cession of power was requisite (pr. rec. p. 25); and that the *note in suit* was ONE *of the thousand so indorsed.*

The recollection of the witness, the President of the Company, as to the probable time when this note was indorsed, is, that it was indorsed in the fall of 1858. (pr. rec. p. 33, 8th line). That would fix the time about two years and one half before its maturity.

Cashiers of banks possess *ex officio* power to pass the title to bills and notes, belonging to such banks, by indorsement in their official capacity.

Story on Prom. Notes, § 127.
Fleckner *vs.* Bank of United States, 8 Wheat. 360, 361.
Wild *vs.* Passamaquoddy Bank, 3 Mason, 505.
Minor *vs.* Mech. Bank of Alexandria, 1 Pet. 46.
Folger *vs.* Chase, 18 Pick. 63.
Hartford Bank *vs.* Barry, 17 Mass. 94.

This power is vested in cashiers *ex necessitate*, as financial agents of such corporations. The president, as executive officer, may not have the power *ex officio* to indorse the negotiable paper of the corporation. The power, however, must reside somewhere. The board of directors possess this power, which, if not specially granted, must exist

and vest in them *ex virtute officii*. Should the board of directors *neglect* or *refuse* to exercise this power, a cessation of the corporate business *pro tanto*, if not *in toto*, would be the result. Would not under such circumstances, the law *shift* or *extend* the power to the *executive* officer on the ground of commercial policy? If it did, the power would vest *virtute officii*.

So far as the proposition under consideration is concerned, there can be no appreciable difference in this case between the *cashier* of a bank and the *president* of a railroad company, who is not only the *executive*, but also the *financial* officer of the corporation. The former is financial agent with the power to indorse *ex officio*, the latter by *creation* or *adoption*.

There is nothing objectionable in the manner in which the note in suit was indorsed. It was indorsed in blank, by procuration, in the usual way, (pr. rec. p. 162,) and in the manner in which the Company was accustomed to indorse. (pr. rec. p. 140.)

Elwell *vs.* Dodge, 33 Barbour, 336.
Scott *vs.* Johnson, 5 Bosworth, 213.
Merchant's Bank *vs.* McColl, 6 Bosworth, 473.
Frye *vs.* Tucker, et al., 24 Ill., 181.
Goodrich *vs.* Reynolds, Wilder & Co., 31 Ill., 469.
Caryl *vs.* McElrath, 3 Sandf. Sup. Ct. R. 176.
Bradley *vs.* McKee, 5 Cranch C. C. R. 298.

Defendant's counsel, in his printed argument on file, page 22, says: "Durand did not sell the note in question; Mr. Wilkinson sold it to the Plaintiff, so that Mr. Durand had no earthly power to indorse this paper, which could be implied from a power to sell. If such power is to be implied from a power to sell the paper, then Wilkinson, who sold the note, should have made the indorsement."

Strange! One of the fictions of which the whole defense is composed. Fiction must vanish when truth appears. The assertion is refuted by Mr. Wilkinson in his answer to the following question:

Q. "Did he, Durand, as such president, during the time you were "agent, sell, transfer and negotiate large quantities of securities of "the nature and character of this security or note in action, and if "yea, were his acts and doings in thus selling, transferring and dis-

"posing of such securities, known to, and sanctioned by, the Board "of Directors of said Company?"

A. "They were. He did sell large quantities of securities of this "character, and *directed* myself and others to sell, *among which* was "this note in suit, and which acts of his own and those done by me "*by his direction* were sanctioned by the Board of Directors." (pr. rec. p. 158.)

So Mr. Wilkinson did sell the note in suit. But he sold it under and *by direction* of the President of the Company. Mr. Wilkinson derived his power to sell from the President. His relation to the Company is that of *sub agency*, and to the President of *direct agency*. If, as the Counsel concedes, Mr. Wilkinson had the power to indorse, *why had not Durand the same power?* Are the powers of the principal not *coextensive* with those of his agent? Does not the *major* include the *minor?* Is not the *whole* equal to, and commensurate with its parts?

The Plaintiff was entitled to recover upon the *original*, and upon the *blank* indorsement of the note. Upon the original under the *common*, and upon the blank indorsement, under both the *common* and *special counts*. His right of recovery under the technical blank indorsement is clearly UNQUESTIONABLE.

b, Validity of Note.

It is claimed by Defendant, that he took stock and gave his note in payment with the *express understanding and agreement* that the proceeds thereof should be used and applied in the construction and equipment of a road to be opened from Beloit to Freeport, in the state of Illinois, and for no other purpose; that the Company had no right to open and operate a road in the state of Illinois; that the note was given for an unauthorized purpose, and is void in law.

Defendant's counsel expatiates copiously on this point, devoting to its consideration twenty-four pages, or fully one half of his entire argument.

I shall not attempt to follow the learned counsel in his æriel flight in chase of visionary phantoms, but will endeavor to demonstrate, that the position by him taken is *untrue in point of fact*, and *erroneous in law.*

Each of the following positions is a complete answer to all that *has been said*, and to all that *can be said* against the validity of the note.

1, The note *was not given* with the restriction that its proceeds should be used and applied in the construction and equipment of any particular part or portion of the payee's road.

2, A special or restrictive agreement, not appearing on the face of the note, could not affect the right of a bona fide purchaser, unless he have actual notice thereof before or at the time of purchase.

3, The payee, at the time of the execution of the note, by articles of agreement with a lawfully existing Illinois corporation, had acquired legal and equitable rights in union and concert with the Illinois corporation, to locate and construct a road in Illinois, and jointly to operate the same in connection with the payee's road.

4, The articles of agreement entered into between the Wisconsin and Illinois corporations were authorized, and effected their consolidation for the construction and operation of their respective roads jointly and in connection. But if their consolidation was informal in *point of law*, it was nevertheless a consolidation in *point of fact*, the legal existence and rights whereof could only be inquired into by writ of *quo warranto*, at the instance of the sovereign state of Illinois.

5, If for the want of corporate seals the consolidation contracts were defective, voidable or void in law, the defect was cured and the consolidation contracts were made valid by legislative enactment.

1, The note was *not given for a special purpose.* The burden of proof to the contrary rests upon the Defendant. His counsel boldly asserts that the note was given for a special and restricted purpose, but refers to no proofs in the case to sustain the declaration. This is a question of fact, and must be fixed by the testimony in the case.

The witnesses examined upon this point are, Davis, Dornblazer and Defendant.

Davis in his answer to the third interrogatory, (pr. rec. p. 45,) testified as follows:

"I was present at a conversation at Defendant's house when De-
"fendant subscribed to the capital stock of said company. Chester

"Bush, who was the agent of the Racine & Mississippi Railroad Com-
"pany, was there. Benjamin Dornblazer, a justice of the peace, was
"also there. The conversation was about the Defendant's taking
"stock in said railroad company. This conversation took place at
"Defendant's house in the town of Rock Grove, Stephenson county,
"Illinois. It was either in the month of May or June, 1856. Pre-
"vious to the time of the conversation, Defendant had signed a sub-
"scription list for stock in said road for $500, I think. At any rate,
"the amount he had so subscribed, was considerably less than the
"amount he subsequently took. When we went to Defendant's
"house, he had concluded to take more stock. At this conversation,
"Dornblazer *did the talking* to Defendant, and made the same repre-
"sentations of the condition of the road, as were made by Mr. Strong
"in his pamphlet. I don't know as anything was said at this time to
"Defendant about the Company's power to build the road; the con-
"versation and representation, were in regard to the benefit of build-
"ing the road, and the profit of taking stock in it. The representa-
"tions were, that the subscription would be a safe investment; that
"the road would pay at least fifty per cent. out of the amount sub-
"scribed within five years; that Defendant, at the end of five years,
"sell his stock for enough to pay the balance of his subscription; that
"is, the fifty per cent. over and above what the road would pay him
"in dividends; that the Company would guarantee to pay the inter-
"est on the note, he should give for the amount subscribed. The
"representations made as to the financial condition of the road to
"Defendant were, that the Company had means enough to complete
"the road to Rockton, and would have a surplus of fifty thousand
"dollars left, and sufficient rolling stock to operate the road. Defend-
"ant, his wife, myself, Chester Bush, Benjamin Dornblazer, and I
"think two of the Defendant's boys were present at this conversa-
"tion. The amount of Defendant's subscription to the capital stock
"of the Company, was thirty seven hundred dollars. Defendant
"paid for this stock, by giving the said Company his note and secur-
"ing the same by a mortgage on his farm. I think this was the sub-
"stance of *all that occurred at this conversation.*"

The same witness on cross-examination testified further as follows:

Cross Int. 6th. "Did you yourself have any conversation with the
"Defendant during this time?"

A. "I did."

Cross Int. 7th. "Was your conversation in English?"
A. "It was."

To Cross Int. 8th and 9th, he testified: "I talked with the Defend-
"ant about the amount subscribed by different parties in that neigh-
"borhood, and more especially about the division of his land between
"him and his brother. We talked about the division, so as to get
"description correct in the mortgage. I talked with him on other
"subjects, about building a new house, crops, and other matters,
"while Bush and Dornblazer were making out the papers."

This is all the testimony of Davis in relation to the subject under consideration.

Dornblazer, in response to the question, direct upon the point, testified as follows:

13th Int. (rec. p. 55). "Was there anything said at the time of
"the subscription and mortgage referred to by you, as to when the
"avails of this and other like mortgages, or was any agreement or
"understanding had, and what, between the said Laber and the said
"agent of said Railroad Company, as to *where* the proceeds of the
"notes and mortgages taken between Freeport and Beloit should be
"used or applied in the building of said road?"

A. "THERE WAS NO AGREEMENT BETWEEN THE DEFENDANT AND
"THE AGENTS OF SAID COMPANY TO THAT EFFECT."

Dornblazer conversed with Defendant in German. (Ans. to 24th Cross Int. rec. p. 58.) Bush and Davis had conversation with Defendant in English, but upon this subject but little. Bush and Davis did not understand German. (Ans. to 26th, 27th and 28th Cross Int. rec. p. 59.)

Laber himself failed to give any direct testimony on this point. Upon cross-examination, he testified as follows: (rec. p. 131.)

Q. "Was your conversation at the time of the giving of this note
"and mortgage, with Messrs. Bush, Dornblazer and Davis in English
"or German?"
A. "German."
Q. "With whom did you converse in German?"
A. "Dornblazer."

Q. "Did you converse with any one else?"
A. "No sir."
Q. "Did not say a word to Bush?"
A. "No sir."
Q. "Did not say a word to Davis?"
A. "*No sir. I only talked with Dornblazer.*"

The above is all the testimony in the case upon the subject under consideration. The only witness, who touched the point at all, is, as seen, Dornblazer, the justice of the peace, who took the acknowledgment of the mortgage. And he, in answer to a question direct upon the point, testified, "There was no agreement between the Defen- "dant and the agents of said Company to that effect."

Now what becomes of the very bold assertion "that the note *was given for that special and restricted purpose?*" Where is the evidence, in the remotest sense, to sustain that declaration? There is *none* in the case.

The Court will here also take into consideration the fact, that the witnesses, Dornblazer and Davis, undoubtedly testified to all they knew or recollected upon the subject, and that they were witnesses whose *minds* were at least *biased* in favor of Defendant, and against the securities in question. This is reasonably supposable from the fact that Dornblazer himself about the same time had taken stock to the amount of seven thousand five hundred dollars, and paid for it in the same manner (Ans. to 33d Cross Int., rec. p. 59.) And Davis, together with his brother, had taken stock to the amount of twelve thousand five hundred dollars. (pr. rec. 152, 39th line.)

Defendant testifies that he had *no conversation* with either *Bush or Davis*, but only conversed with *Dornblazer* and *that* in *German;* that he did not say *a single word* to either Bush or Davis. But Davis and Dornblazer testify that *he did* converse with both Bush and Davis. This discrepancy is not easily reconciled. Nor is the discrepancy easily reconciled that Dornblazer conversed with Defendant in German, that Davis and Bush did not understand German, and yet Davis pretended to give the conversation between Defendant and Dornblazer. Defendant says he talked in German because he could not understand English. Be that as it may, it is strange at least. The Defendant was born in Pennsylvania in 1809; lived there until 1844,

when he went to Illinois. In 1856, when this transaction took place, he was forty-seven years of age. (pr. rec. p. 132.) Is it possible that a person can be born, and live in this country forty-seven years, and not be able to understand English? Query; if he could not understand English at the age of forty-seven, is it likely that a few years after he should be able to give his testimony in good English? Yet he did. The character of these witnesses and the discrepancies in their respective testimony has been shown, that the Court may give it the weight it deserves.

Biased and conflicting as the testimony of these witnesses is, *not the faintest trace* can be discovered to the effect that the note in question was given for a *special and restricted* purpose, namely, *that its proceeds should be used and applied in any particular manner.* But the contrary does appear from the testimony of Dornblazer, "*There* "*was no agreement between the Defendant and the agents of said Com-* "*pany to that effect.*"

The Defendant, as many others did, purchased stock and paid for it by executing his note and mortgage, which he at the time well knew were to be thrown upon the market to be sold for cash. He had the privilege to purchase or not to purchase stock *ad libitum.* His volition in this respect was his sovereign personal prerogative. Wiser and better men did the same, and did it in good faith. (rec. p. 142, last line.)

At the trial, Plaintiff's attorney, not knowing but what the money derived from the sale of the note in question might *perchance* have been actually expended, as Defendant declares it should have been, asked the witness, Durand, who, if any one, was likely to know, the question: "Do you know what was done with the money—how the "money was applied—that was received on this paper?"

To this question Defendant's attorney *objected as immaterial.* (pr. rec. p. 25.)

Thus the Court will see that what was *immaterial* then, has become *quite material* now. Curious and unaccountable transformation! Has the spirit of Prospero breathed upon Defendant?

2, The note not having been given for a special or restricted purpose, as a matter of fact, notice to Plaintiff is simply *an impossibility.*

It is useless to spend time upon this subject. Let Defendant first lay a foundation for proof of notice.

The real gist and logic of my learned opponent's argument (page 25,) on this point amounts to this: That Fletcher Cooper being the agent of the Plaintiff, and seeing that the Company was constructing a road, "must have been dull beyond legal presumption, if his mind did not comprehend the *probability* that the note *was given* for a purpose" for which it was *not in fact given;* "that he was bound to inquire and had no right to be wilfully ignorant upon this subject." *Arbitrary* law, to require an *impossibility!*

I hardly think the numerous authorities quoted, will sustain his logic.

3, Corporations are creatures of statuto y law. Their charters are their *magna charta*, or bills of rights. The several states of the union are sovereignties independent of each other. Neither can legislate *extra territorially*. Hence one state cannot charter a corporation with franchise powers beyond its territorial limits.

Nevertheless, corporations, chartered in one, may sue, contract and do business in another state, if no law to the contrary exists there. This right or capacity of a corporation to sue, contract and transact business in a foreign state is not derived, as in the case of natural persons, from the *lex naturæ*, or from constitutional prerogatives, but exists *ex comitate* between the sister states.

Justice Kent says: "As we have no general statutes of *mortmain*, "perhaps a legally constituted corporation in another state can pur- "chase and hold land in New York, provided its charter gave it the "competent power." 2 Kent's Com. 317.

This proviso, or saving clause, cannot be understood to mean the grant of *competent power* from the state of its creation to exercise rights of franchise, or those incident thereto, in the foreign state, but *infra territorium*, where the corporation lives and has its being.

Although corporations live and have their being in the state of their creation only, yet it does not follow that their existence there will not be recognized in other places. Residence in one state, *per se*, creates no obstacle to their power of transacting business in another.

It is sufficient that the existence of a corporation in the state of its creation is acknowledged and recognized by the state where the dealing takes place, and that it is permitted by the laws of that state to exercise the powers with which it is endowed. The exercise of corporate charter powers depends for its validity upon the laws of the foreign sovereignty.

Angell & Ames on Corporations, § 161.
Com. & R. R. Bank of Vicksburg *vs.* Slocomb, 14 Pet., 60.
Irvine *vs.* Lowry, 14 Pet., 293.

Thus, where a New York coal company, thereto authorized by its charter, purchased coal land in Pennsylvania, this Court held that its right to hold the land so purchased depended upon the assent, express or implied, of the commonwealth of Pennsylvania.

Runyan *vs.* Costar, 14 Pet., 122.

The rule seems to be well established, that in the states where there is no law of *mortmain*, or in restriction in this respect, corporations of other states, provided they are vested with the competent power *infra territorium*, may purchase and hold lands *ad libitum*.

Silver Lake Bank *vs.* North, 4 Johns, Ch. 370.
Lumbard *vs.* Aldrich, 8 N. H., 34.
Lathrop *vs.* Com. Bank of Scioto, 8 Dana, 119.
Bank of Washtenaw *vs.* Montgomery, 2 Scam. 428.
2 Kent Com. 284, 285.
New-York Dry Dock *vs.* Hicks, 5 McLean, 111.
Farmer's Loan & Trust Co. *vs.* McKinney, 6 McLean, 1.
State *vs.* Boston, Concord & Montreal R. R. Co., Vt. 25, 433.

The Racine, Janesville and Mississippi Railroad Company was chartered in Wisconsin in the year 1852, (rec. p. 121,) with power to purchase, hold, sell, lease, and convey estate, real, personal or mixed (rec. p. 115, sec. 2,) for the purpose of locating and constructing a single or double track, from the city of Racine, in the county of Racine, via the village of Janesville, through the counties of Rock, Green, Lafayette and Grant, to the Mississippi River, etc. (rec. p. 116, sec. 9, and p. 120, sec. 18.)

By a further act, in March, 1855, the legislature changed its name

to Racine & Mississippi Railroad Company, by which it has since been known.

By an amendment to its charter in June, 1853, the Company was empowered to build a branch railroad from the main line at any point west of Fox River to Beloit, the state line, etc. (rec. p. 122.)

The Rockton and Freeport Railroad Company was chartered in Illinois in February, 1853, with power to locate, construct, complete, maintain and operate a railroad, etc., from a point on the north line of the county of Winnebago, through the village of Rockton, to the village of Freeport, in the county of Stephenson, etc., to enter upon, take and hold all lands thereto necessary, etc. (Sess. Laws of Ill., p. 71, §§ 6 and 7; rec. p. 163, 8th line.)

By their respective charters, the Racine & Mississippi Railroad Company and the Rockton and Freeport Railroad Company were authorized, the one to construct a road from Racine to Beloit or state line, and the other from the state line to Freeport, and to take and hold lands requisite for the purposes.

There being no law to the contrary in the state of Illinois, it must be conceded in reason and from the authorities cited, that the Wisconsin corporation had the competent power to make and enter into contracts in the state of Illinois, to purchase and hold land for the purpose to extend its line of road within the latter state. I do not mean to be understood that it might acquire land for its lawful purposes by *condemnation*, or by the exercise of the right of eminent domain, for that power within its territorial limits, exclusively belongs to the sovereign state of Illinois, and can only be exercised by it in the first instance, or by others by express cession or delegation from the state itself, but an acquisition by friendly purchase. The corporation, would, of course, be subject to the laws of the foreign state, and its acquisitions there might, perhaps, eventually become forfeited to that state; but that sovereignty, in its discretion, might not only allow, but also encourage and protect the acts and doings of the foreign corporation by acquiescence, or by positive law.

The Racine & Mississippi Railroad Company, by its original (rec. p. 117 § 91,) and amended (rec. p. 122 § 1,) charter was endowed with the power to connect and operate its road with other railroads in the state of Wisconsin, and to *consolidate* its capital stock with the

capital stock of *any* railroad company, with which its road might intersect.

By an act, approved July 9, 1853, the legislature of Wisconsin ceded and granted further and more extensive powers. Although in evidence, (rec. p. 163, 8th line,) this act has, inadvertently, been omitted from the record; its insertion here will facilitate an inspection of its provisions.

Section I. of the Act is and reads as follows:

"The Racine, Janesville and Mississippi Railroad Company are "hereby authorized to *connect* their railroad at Beloit with *any* rail- "road or branch railroad now chartered, or which shall hereafter be "chartered *in the state of Illinois*, and shall have power to operate "their railroad in connection with such road or roads, or any portion "thereof, *on such terms as may be agreed upon by said companies re-* "*spectively*, and shall have power to *lease* or *purchase* the whole or "any portion of any such railroad, and shall also have power to *con-* "*solidate* the capital stock of said Racine, Janesville and Mississippi "Railroad Company with the capital stock of any such Illinois road "now or hereafter chartered by the state of Illinois with which said "company may connect at Beloit, and shall have full power to place "the road of this company and its capital stock so consolidated under "a joint board of directors, to be chosen on such terms as the directors "of the company consolidating their capital stock shall agree upon."

The legislature of Illinois granted similar powers to the Rockton and Freeport Railroad Company by section X. of its charter as follows:

"It shall be lawful for the said company to *unite* with any other "railroad company, which may have been or may hereafter be incor- "porated by the state of Wisconsin, and running from the terminus "of said road in a direction towards Lake Michigan, and to grant to "any such Company the *right to construct* and *use* all or any portion "of the road hereby authorized to be constructed; also the right to "*purchase* or *lease* all or any part of said road; also the right to *sell*, "*lease* or *convey* the same to said company, or *consolidate* its stock "therewith, and place the management and control of the same un- "der said board of directors upon such terms as may be agreed upon "between the said railroad companies."

The objects and intentions of the two legislatures are plain and unmistakable; they shine like beacon lights from neighboring shores, reflecting greater brilliancy and power one upon the other, in terms direct, positive and reciprocal. The Wisconsin company might indeed locate and open its road from Racine to the Mississippi, through Wisconsin, but it would not open to commerce as productive and fertile a country as by a more southern line through Illinois. The Illinois company might indeed open its road from Freeport to Rockton and state line, or from one inland country village to another, but of what importance would that be? Produce and merchandise must move from country to commercial cities, and *vice versa;* therefore a road to Rockton, a little village, or the Illinois state line, must necessarily be extended to a point on the lake, to make it available for commerce. This was well understood by both companies, and by the legislatures of both states. Joint action was requisite—*joint action was had.* If the legislatures had taken no action on the subject, the two companies, with legislative assent by acquiescence alone, might have accomplished the same end. But the respective legislatures approved the undertaking and conferred upon the companies even *greater* powers than were necessary to effect the object in view. The express and direct powers thus conferred may be abbreviated and compared in the manner following:

Express powers of the Racine and Mississippi Railroad Company:	Express powers of the Rockton and Freeport Railroad Company:
1, To *connect* and *operate* its road with that of the Illinois company, on such terms *as may be agreed upon* between the two companies.	1, To *unite* with, and grant to the Wisconsin company the right to construct and use its road.
2, To purchase the road of the Illinois company.	2, To sell its road to the Wisconsin company.
3, To lease the road of the Illinois company.	3, To lease its road to the Wisconsin company.
4, To consolidate its capital stock with that of the Illinois company.	4, To consolidate its capital stock with that of the Wisconsin company.

To accomplish the lawful purposes of the two companies, it was not necessary to call in requisition all the powers thus expressly and *lavishly* granted. Much time and space is devoted to an attempted demonstration, that the grants of the respective companies failed to

be mutual, that the one may have had the power *to give*, but that the other had no power *to receive*. Defendant fairly drowns himself in a sea of erudition concerning technicalities, which have no foundation in law or fact. I am content to leave the construction of these legislative acts to the Court without comment.

The case of the Metropolitan Bank *vs.* Godfrey, et al., 23 Ill., 579, upon which Defendant plants himself and relies, has, in this respect, no application whatever to the case at bar.

In that case, one Dwight conveyed certain real estate in Illinois to the Metropolitan Bank in fee simple. The Supreme Court of Illinois, from the evidence in the case, found and decided the points following:

1, That the bank was organized under the general banking law of New York, passed April 18, 1838, and that by section 24 of that Act the bank could purchase, hold and convey real estate for *specified* purposes only.

2, That all conveyances of real estate, by direction of its charter and by-laws, had to be made to the *president* of the bank.

3, That the real estate in suit was conveyed to the *bank by its corporate name*, and not to the president of the bank.

4, That the conveyance was not made for any of the specified purposes authorized by its charter, nor within the scope of its business, and that therefore the bank *transcended its authority*.

5, That by the law of Illinois a deed absolute on its face, but intended only as a mortgage, is inoperative as a deed.

Chief Justice Caton gave his opinion that the deed was void for *want of a grantee*, saying "the law not only *failed to confer* upon the bank *the power to take the deed*, but it impliedly *forbid it* by *expressly directing*, that it should be given to another."

None of the points there decided have any application to the subject now under consideration. Instead of having any relation to the points of defense, the decision in that case directly propounds the rule of law *before* stated, and indirectly, or by a *negative pregnant*, adopts the rule contended for by Plaintiff, that a corporation, *having*

competent power to acquire and hold land in the state of its creation, may acquire and hold land for like purposes in a foreign state, where there is no law to the contrary.

4, The articles of consolidation between the Racine & Mississippi Railroad Company and the Rockton & Freeport Railroad Company (rec. p. 114,) were *expressly authorized* by their respective charters, were *valid* and *binding* in law, and required no seals.

The agreement embraces two items, namely: The Illinois company grants and gives to the Wisconsin company the right to *construct* and *use* the road of the former; and the consolidation of both companies. The parties to the agreement, by the 8th article, declare their intentions and the meaning of the agreement to be "to fully "*merge* and *consolidate* the capital stock, powers, privileges, immuni- "ties and franchises of the Rockton & Freeport Railroad Company "with the Racine, Janesville & Mississippi Railroad Company."

The Rockton & Freeport Railroad Company, under the first item or compact, granted or ceded to the Racine & Mississippi Railroad Company the right to *construct* and *use* its road. It cannot be contended, that the grant of right to *construct*, embraces also a grant of *bargain* and *sale* of the road itself, or of the franchise. The company, without express power, might have contracted with any party for the construction of its road. The right to construct a railroad upon the land of a railroad company, acquired for that purpose, is of no greater magnitude in law, than the right to construct or build a *house*, *bridge* or *tunnel* upon the land or property of another person. Hence a contract, embodying the terms of agreement of the former, stands upon the same footing with the contract of the latter. Both are contracts *in personam*, not *in rem*, and require no seals for symbolic solemnization.

The grant of the right to *construct* and *use*, is not a grant of the *franchise*. The fee of the road, and the franchise of the company, are not one and the same thing. The former is a matter *tangible*, the latter *intangible*, or a substance without form. Blackstone defines a franchise to be: "a royal *privilege*, or branch of the king's preroga- "tive subsisting in the hands of a subject."

2 Blackstone Com. 37.

The franchise of a railroad company is radically nothing else than the delegated prerogative right of eminent domain. The land once acquired, by friendly purchase or by the prerogative right of condemnation, the construction of a road thereon, its management and control are rights incidental, of such a nature, as might exist disconnected from and independent of the franchise and without express legislation. No objection can be perceived why persons individually or collectively upon their own lands could not exercise the same rights.

The right to *use* is a right of occupancy or tenancy for a specified term of time, for years, months, or at will. A contract expressing this relation, or conferring this right, is a *lease.* It is adjudged in Illinois that a lease of real estate in that state requires no seal.

Lake *vs.* Campbell, 18 Ill. 106.

The compact of consolidation of capital stock is an agreement concerning personal property, and requires no seal.

The parties to the agreement took particular pains to express and declare the meaning, they proposed and intended to impart to, and embody in, their contract by a separate explanatory and declarative clause to be "to fully *merge* and *consolidate* the capital stock, powers, "privileges, immunities and franchises of the Rockton & Freeport "Railroad Company with the Racine, Janesville & Mississippi Rail-"road Company."

If the strict literal sense of the word "*merge*" is to be applied, then there is not only a *discrepancy* but an irreconcilable *inconsistency* in this clause and in the contract itself. To *merge* the Illinois company *with* (or rather *into*) the Wisconsin company, would in effect be the destruction and annihilation of the Illinois company. To *merge*, is to be *sunk*, *swallowed* or *lost*. To *merge*, in law, is to *drown* a *less* into a *greater* estate. There can be no *merging* of two equalities, or equals. One fee simple cannot be merged into another, both being like estates. One corporation cannot be merged into another, for, like two natural persons, one is the equal of the other.

If therefore the word "*merge*" cannot by a *reasonable* intendment be construed to harmonize with the word "*consolidate*," the law will reject it.

The word "*consolidate*" expresses the real intention and condition

of the parties, and no other meaning can be gathered from the context of their agreement. To *consolidate* is to *unite;* to consolidate two bills, is to *unite* or *combine* them into one. It is reasonable to suppose, that the parties to the agreement intended "merge *with*" and "*consolidate*" for *synonymous* terms of expression. This intent may be inferred from the context of the whole. The construction is reasonable and will harmonize, not only with the whole agreement, but also with the actual facts in the case.

The agreement contemplates nothing more nor less than a *union*, a *consolidation* of stocks, a concerted or united manner of controlling and managing the two roads; a union or partnership in the common business, in its profits and losses. And that is all that two corporations can in law accomplish. One corporation cannot be merged into another in law, or fact. But if it could, a *union* of stocks, interests and powers excludes the idea of merger.

Farnum *vs.* Blackstone Canal Co., 1 Sumn. 46 and 480.
Ohio & Miss. Railroad Co. *vs.* Wheeler, 1 Blackf. 295.
Warren Manuf. Co. *vs.* Ætna Insurance Co., 2 Pa. 502.
Phil. W. & B. Railroad Co. *vs.* Quigley, 21 How. 214.

An agreement of consolidation requires no more to be under seal than an agreement of partnership. A consolidation of corporations is virtually nothing else than an actual partnership. It is a *union* or *combination* for business purposes. There was no conveyance of real estate or franchise by one company to the other; none was required. The consolidated company, if it might be so called, possessed all the rights, powers and interests of the two companies before consolidation, for the whole is equal to its parts. The consolidation was expressly authorized, and all that was necessary for the two corporations to do, was to agree one with the other, and act in union. No written articles were required to consummate their union or co-operation. But if all the grounds, for the sake of argument, be conceded to the defense, there was still a *de facto* consolidated company, whose existence in law could only be inquired into by the governments of Illinois and Wisconsin, and not by the citizens of either state. This principle of law requires no citation of authorities.

5. Whatever informalities or defects, if any, intervened and subsisted in the articles of consolidation between the two corporations, they were completely and effectually removed by legislative action.

The legislature of Illinois, by an act, approved February 14, 1857, legalized and ratified their acts of consolidation. The act provides that "all acts of consolidation entered into between the Rockton and "Freeport Railroad Company and the Racine, Janesville and Missis- "sippi Railroad Company, and all agreements in relation thereto, and "also all acts of consolidation and agreement entered into between "the Savanna Branch Railroad Company and the Racine and Missis- "sippi Railroad Company, be, and the same *are hereby confirmed* and "declared *legal* and *binding* upon all parties thereto, provided the "same *has been done* with the consent of the stockholders."

Ill. Sess. Laws of 1857, page 648.

This act ends the controversy, provided the legislature possessed competent power to pass it. Legislatures may enact laws to validate defective, voidable or void contracts. The law upon this subject is settled by many adjudications.

Justice Story says: "If a state statute should, contrary to the "general principles of law, declare, that contracts founded upon an "illegal, or immoral consideration, or *otherwise void*, should, never- "theless, be valid and binding between the parties, its retrospective "character could not be denied, for the effect would be to create a "contract where none had previously existed. Yet it would not be "reached by the Constitution of the United States, for to *create* a "contract, and to *impair* or destroy one, can never be construed to "mean the same thing."

2 Story on the Constitution, § 1398.

The rule, that legislatures may *validate* defective or *void* contracts, is sustained in the following cases:

Wilkinson *vs.* Leland, 2 Pet. 627.
Charles River Bridge *vs.* Warren Bridge, 11 Pet. 420.
Florentine *vs.* Barton, 2 Wall. 210.
Watson *vs.* Mercer, 8 Pet. 88.
Thompson *vs.* Lee County, 3 Wall. 327.
Ill. Grand Trunk R. R. Co. *vs.* Cook, adm'r, etc., 29 Ill. 241.
Goodrich *vs.* Reynolds, Wilder & Co., 31 Ill. 529.
Pres. & Treas. of Keithsburg *vs.* Trick, 34 Ill. 405.

"Provided the same *has been done* with the consent of the stockholders." This proviso has reference to *past* consent,—at the time of consolidation. How is this consent to be proved? It is to be remembered that the corporations had *express* charter rights to consolidate; that they consolidated, constructed, managed and controlled their roads jointly in point of fact.

It is not known that a single objection was *ever* urged against the act of consolidation by *any* stockholder. The assent of the stockholders may be presumed from their acquiescence in the acts done in pursuance of consolidation. Direct or actual consent was not necessary.

The Supreme Court of Illinois passed upon this question of consent, in a similar case, as follows: "subsequently an act of the legis-"lature was passed authorizing them all to consolidate, so that all "should constitute but one company, owning and operating as one "road all the different sections and branches formerly owned by them "separately; and this was done without the unanimous consent of "all the stockholders of all the original corporations; to *have required* "*that*, would have rendered the consolidation an *impossibility*, no "matter how manifestly the proposed measure might have been for "the common good of all, so many stockholders would have been "found opposing it, with the intention of being bought up to give a "consent, which, in reality, their own interests demanded they should "give voluntarily, that *nothing could ever have been done.* It is a "lamentable truth that the history of human affairs shows that such "is human nature, as exemplified by too many. The *ever ready* an-"swer is, *may I not do with my own as I will?*"

Sprague *vs.* The Illinois River Railroad Co., 20 Ill. 654.

This Court has decided that grants and proceedings beneficial to a corporation are presumed to be accepted, and that *slight acts* are admitted presumptions of that fact.

Bank of United States *vs.* Dandridge, 12 Wheat. 60.

So it is said, that "the shortest acquiescence of the stockholders in "the combination of different companies, by act of the legislature, "will be likely to be held by the courts as conclusive of their rights "to interfere."

Redfield on Railways, § 252.
Angell & Ames on Corporations, § 86.

One of these very farm mortgage cases came before the Supreme Court of Illinois at the September Term, 1867, in which this same objection was urged. The Court held this *verbatim* language: "The "law is well settled in this state, that under a plea of *nul tiel corpor-* "*ation* the Plaintiff need only show an organization *in fact*, and a "user of corporte franchises: quoting, Marsh *vs.* Astoria Lodge, 27 "Ill. 421; Pres. & Trust. of Mendota *vs.* Thompson, 20 Ill. 197; Town "of Lewiston *vs.* Proctor, 27 Ill. 414; Hamilton *vs.* Town of Carthage, "24 Ill. 22. In this case there has been *an effort to consolidate* the "two roads. Articles had been *drawn up* and *signed*. Officers had "been elected and entered upon the discharge of their duty and were "engaged in the construction of the road, which was *certainly suffi-* "*cient* to repel the presumption of fraudulent representation *that the* "*road had consolidated*, unless the officers *knew* that the consolida- "tion was illegal and unauthorized. Having given these notes to the "company, appellee admitted the existence of a corporate body, and "it devolved upon him to show *that no such body existed in fact*, to "avoid the payment for want of a party with whom to contract."

Mitchel et al. *vs.* Deeds, yet unpublished.

The Defendant had no right to object to the acts of consolidation, for at that time he was no stockholder in either corporation, but a *stranger* to both. When afterwards he became a stockholder and gave his note, (as he now contends), for *that special purpose*, he thereby not only became chargeable with notice,—but he *admitted* the existence of a *consolidation in fact*, if not *in law;* and he is therefore *estopped* from asserting the contrary.

Again, the declaration and the special plea *directly aver* that he purchased stock in the *Wisconsin* company, and that he gave his note in payment thereof. That being the case, he took the stock of *that company* with *pro tanto* rights, privileges and immunities, which the company then possessed or might thereafter acquire.

Nothing appearing *on the face* of the note, or by proof with notice to Plaintiff, *dehors*, as to a *special* application of the funds to be derived from the sale of the note, the law *will presume*, that the proceeds went into the *general* fund, for the *general* purposes of the company.

If it *were true*, that the proceeds of the note were to be applied to special purposes, and *that* fact appeared on the *face of the note*, yet the Plaintiff *would not be held* responsible for a misapplication of them. Such a misapplication would, in law, amount to a breach of special trust on the part of the corporation, for which Plaintiff could in *no event* be responsible, because the money, when paid, was beyond his *possible* control, and he was not *in law*, or *fact*, the guardian, or trustee of either the corporation or the Defendant. It was within the power and discretion of the corporation only, to apply the money *as it pleased*. If it *were true*, that such breach *actually occurred* and *that he sustained damages thereby*, the Defendant can have redress against the party, in *whom he reposed the trust*, and against that party only.

c. Fraud in the execution of the note.

Pleas of fraud against a *bona fide* holder of bills or notes, for value, were not allowed at common law.

Chitty on Bills, 79.
Story on Prom. Notes, § 191.
Robinson *vs.* Reynolds, 2 Adol. & Ellis, 196.
Haskell *vs.* Whitmore, 19 Maine 102.
Smith *vs.* Hiscock, 14 Maine 449.

The special plea, therefore, was interposed under the statute of Illinois. The statute authorizes the defense only when fraud intervened in the *immediate execution* of negotiable instruments.

Scates Statutes of Illinois, I. Vol. 293.

At the trial of this case a strenuous, but fruitless, effort was made, on the part of Defendant, to prove the issue of fraud presented by the special plea. Five witnesses were examined—Davis, Dornblazer, Stover, Merrill and the Defendant himself.

A pamphlet of Marshall M. Strong, one of the directors of the company, and the annual report of the company were offered and received in evidence. The Circuit Court gave the Defendant the *widest range* to prove the alleged fraud, *if fraud in fact existed*. This great bulk of worthless chaff was presented and garnered up with faint hope that perchance *one kernel* might be found, whereon the frail issue of *fraud* might *feast*.

The Court, closely weighing and scrutinizing the evidence in the case, found no fraud in *law*—the Jury *none in fact.*

I will not attempt to pass upon all the evidence in the case offered and received under this issue; it comprises the greater part of the record.

The pamphlet of Mr. Strong (rec. p. 66,) which the Defendant, and perhaps the other witnesses never read, and which probably on that account has been pointed to, as the very neucleus of fraud, the Court, on inspection, will perceive, is a *prospectus*, or essay upon the then proposed enterprise, ably written and carefully compiled, which commends itself to reflective and apt minds, and elicits admiration.

The able, frank and enterprising gentleman, by means of that pamphlet, placed before an interested public his own views and opinions eoncerning the proposed location of a road, and its probable financial success. His opinions and anticipations proved well founded. Not the slightest trace can be discovered of an *animus* or intention to deceive.

The correctness of the Company's annual report of February, 1856, (rec. p. 78,) has been called in question, but the testimony of the Hon. Durand is positive and conclusive. (rec. p. 148 to 149.)

From the testimony of Stover the Court will perceive, that he was a fast and willing witness, entitled to little if any consideration. The key to his influenced conduct may probably be found in the following portion of his testimony: (rec. p. 37).

Cross Int. "What was the amount of your stock subscription?"

A. "The amount of my stock subscription was *ten thousand* dollars."

Cross Int. "In what manner did you pay for this amount of stock?"

A. "I gave my own note and mortgage on real estate for the whole amount in May, 1856, to the Racine & Mississippi Railroad Company."

Cross Int. "Have you since paid off those notes, or any of them, by you so given?"

A. "I have not."

Cross Int. "Has payment thereon been demanded of you since their maturity?"

A. "Payment of them has been demanded."

Cross Int. "Are any of these in suit against you and where?"

A. "Some of them are, *I believe*, in Chicago in the Circuit Court of the United States for the Northern District of Illinois."

Cross Int. "Are the counsel for the Defendant in this cause also defending you in the suits upon your notes mentioned?"

A. "They are."

The inquiry, "was any fraud practised upon Defendant to cause the execution of his note?" points back to the circumstances transpiring at the time the note was given. It has already been shown that Davis, Bush and Dornblazer went in company to Defendant's house to take his note and mortgage in payment of the stock he had already subscribed. Bush, the actual agent of the payee, died before this suit was brought. The testimony shows that Bush had little or no conversation with the Defendant at that, or any time, that Dornblazer *only* conversed with him upon the subject, and *that* in German. Bush and Davis did not understand German.

Davis testified that, before they went to his house, Defendant had not only signed the subscription list for $1000, but had concluded to take more stock,—as much as his neighbor Gardner or Sheckler had taken. (rec. p. 50.)

The Defendant himself testified, that, some time before he gave his note, he had subscribed a subscription list for $1000. (rec. p. 129, second last answer.

The testimony of these two witnesses establishes the fact, that the Defendant *had signed* a subscription list for stock to the amount of $1000, and *concluded* to take more, *before* the agents of the company called on him for pay, and before *any* of them had *any* conversation with him on the subject.

This state of facts *excludes* the presumption of fraud. If his mind was fixed *before* the agents saw him, it must follow that the agents *did not* induce, much less practice fraud upon, him.

But the idea of fraud or deceit is still farther distanced, if the fact is taken into consideration, that these very men, Davis and Dornbla-

zer, who called themselves agents of the company, had likewise taken stock to large amounts, at about the same time, and paid for it in the same manner. They were men in the same *status* or position with the Defendant. It must certainly be admitted, that if *they knew* or had the *least suspicion*, that the company intended to deceive or defraud *them*, they would not have taken stock; that, having taken stock, and to large amounts, they must not only have been satisfied *in their own minds*, that the transactions were perfectly fair, but must also have had confidence in the result of the undertaking. Themselves confident and without suspicion, it is not, in the remotest sense, presumable, that *they* could, *knowingly*, as agents of the company, or as volunteers, have practised fraud upon the Defendant. The position of the parties *alone* is conclusive that no fraud was *intended*. There *can be no fraud*, without an intention to deceive.

But where lies the secret main spring that induced Defendant to purchase stock and give his note and mortgage in payment? Where is the cruel tempter, and by what appellation may he be known?

Defendant's own testimony furnishes the response. (rec. p. 128.)

Q. "For what purpose did you take the railroad stock?"

A. "*To improve the country.*"

Q. "Do you think the railroad was an improvement?"

A. "Yes, sir; I think so."

Q. "In what respect did you suppose it to be an improvement?"

A. "So that we could carry our things away."

Q. "How far from a railroad station were you before this road was opened?"

A. "*Twenty* to *twenty-five miles.*"

Q. "How near are you to the depot now on this road?"

A. "About *three* miles."

Q. "Did you suppose, sir, that the construction of this road would also enhance the value of your property?"

A. "I should think so."

Q. "Well, now, did it?"

A. "It did; I am nearer to the railroad than I was before. I can send my things better."

Q. "What was the comparative value of your land before the railroad was constructed, in 1856?"

A. "About *fifteen* to *twenty* dollars."

Q. "What is it worth now per acre?"

A. "I don't know; it is worth *forty* dollars any way. I could get at least *fifty* dollars for it."

This testimony reflects the motives, that induced Defendant's action, as clearly as the transparent waters of a placid stream reflect the electric rays of the noon-day sun.

He wanted the road to open a convenient market for his produce. He sought his own prosperity and advantage in the consequent certain rise in value of his possessions. His stock, too, might pour into his lap *ten* or *more* per cent. on the investment. These and kindred selfish motives took possession of his mind. Elated with the sure and lavish diffusions of flattering fortune, his transported mind could dwell only upon the golden fleece in *prospectu.* He seized upon the offered opportunity—to put money in his purse.

His stock may have depreciated; but the principal consideration, the main-spring to his action, is permanently secured. The road is in successful operation and furnishes him the market he desired. His possessions, too, have enhanced in value two hundred per cent. What need he care? He has lost nothing. Why complain? He did not anticipate his stock "*would make him any richer.*" (rec. p. 130, 19th line.)

Fraud? Deceit? The jurist might as well look for an elephant, promenading the labyrinthic cells of a bee-hive, as to look for fraud in the departments of this case.

d. Bona fides of Plaintiff.

As before remarked, the Racine & Mississippi Railroad Company, by its president, threw these securities upon the public market for sale. Sub-agents were appointed to assist in the sale and disposition of them. Mr. Wilkinson, a merchant, and at the time mayor of the city of Poughkeepsie, Dutchess county, New York, was one of the sub-agents appointed for that purpose. He had known Plaintiff for years.

Aware, or supposing, that by his industry and frugality the Plaintiff had saved up a few thousand dollars for investment, Mr. Wilkinson besought him to purchase some of these securities. (rec. p. 159, last answer.)

The Plaintiff reposing confidence in the integrity of Wilkinson, as well he might, agreed to purchase some of these securities, provided the mortgage security was sufficient, and satisfactory. He deputized his son Fletcher to go and examine some of these farm securities, with the instruction, that if he found them sufficient to purchase a certain amount.

Testimony of Plaintiff, rec. p. 160, 161;
Testimony of Wilkinson, rec. p. 158;
Testimony of Fletcher Cooper, rec. p. 154.

Plaintiff's son went and examined Defendant's securities, (rec. p. 154). He met the Defendant at his own place, who having been made acquainted with the object and purpose of Plaintiff's agent, "intimated that it (his land) was worth twice the security, and laugh-"ed at the idea that we should doubt anything of the kind." (rec. p. 154, first answer.)

Plaintiff's agent considered Defendant's security sufficient, and purchased the note in suit, and paid for it *par value*, or the *face* of the note.

Testimony of Fletcher Cooper, rec. p. 155, 9th line;
Testimony of Wilkinson, rec. p. 157, last line;
Testimony of Plaintiff, rec. p. 160;
Testimony of Davis, rec. p. 46.

From the testimony of Plaintiff, Fletcher Cooper, Wilkinson and Davis, the Court will be convinced, that the Plaintiff is a *bona fide* purchaser of the note in suit, in the *broadest sense* of the law.

He stands before this Court not only a *bona fide* purchaser for value, but also a *prudent* man. He deputized, at his own expense, an agent to make reasonable inquiry concerning the sufficiency of the mortgage security. This agent sought and met Defendant at his own door.

If the Railroad Company obtained the note and mortgage of Defendant by means of fraud or unfairness, *then* it was not the time for him to *laugh*, but *to speak*, or *forever afterwards hold his peace.*

"We may lay it down as a *broad general principle*," said Justice Ashhurst, "that whenever one of two innocent persons must suffer

"by the act of a third, he who has enabled such third person to occa-
"sion a loss must sustain it."

Lickbarrow *vs.* Mason, 2 T. R., 70.

And this is the established rule of law.

Story on Agency, Sec. 127.
Parsons' on Contracts, I. Vol., 213.
Fitzherbert *vs.* Mather, I. T. R., 12 and 16.
Goodman *vs.* Eastman, 4 N. H., 455.

Chitty says: "In general, the circumstances of a bill or note hav-
"ing been obtained without adequate consideration or even by *duress*
"or *fraud*, or misapplied by an agent to his own use, affords no de-
"fense, when the instrument comes into the possession of a *bona fide*
"*holder* for value, without notice, and before it is due. It is but
"just, that if one of two innocent persons must sustain a loss, he who
"has suffered a negotiable security with his name attached to it, to
"get into circulation, ought to bear the loss, and seek his remedy
"against the person, who improperly passed the instrument."

Chitty on Bills, 79.

e, The Verdict.

The objection, that the Jury found the "*issue*" for Plaintiff, merits but passing attention.

It is quite immaterial at this time to enquire whether the Jury returned the verdict finding the "*issue*" for Plaintiff, or whether the omission of the letter "s" is a clerical misprision, occurring in the transcription. Whatever the fact, in this regard, may be, the objection *comes too late.*

State Bank *vs.* Batty, 4 Scam. 201.
Parmelee et. al., *vs.* Smith, 21 Ill., 620.

Appellate Courts *will not consider* trifles of this character.

The evidence in the case was before the Jury. The Court instructed the Jury to find the facts, in issue, as appearing from the evidence. The Jury found the facts for Plaintiff. By "*issue*" the Jury meant *all the facts in controversy* between the parties. The

law can presume nothing else. After judgment all presumptions are in favor of the verdict.

United States *vs.* White, 5 Cranch C. Ct. 73.

The Statute of Jeofails, too, is a complete bar to the objection.

Scates' Statutes of Ill., I. Vol., 250.
Reardon *vs.* Smith, 36 Ill., 204.

Casting a retrospective glance at the evidence in the case, it may be said without causing modesty to blush, that the Defendant assiduously and skillfully marshalled and called to his standard all the facts and circumstances, directly and indirectly, in any manner connected with the case, to defeat a recovery on his note. He lost the battle—not because Plaintiff's standard was more skillfully borne, but because *right—the law and the facts*—were on his side.

Defendant gave his note with full knowledge, and for the purpose, that it should be sold in the public market, and pass into hands of innocent parties. He knew, and had reason to know, that third parties were expected to pay their money for it. When the Plaintiff's agent called on him, he assured him of the sufficiency of the security, and thus encouraged him to purchase.

I submit in sober earnest, and with due deference, that no principle of law can be cited from the days of Justinian to the present time, by which Plaintiff can be debarred from a recovery on this note.

Law is impartial justice ascertaining, defining and securing to men their relative rights. It gives to Cæsar the things, that are Cæsar's; it will protect Plaintiff in his rights.

Not content with the result, Defendant implores the consideration of this Court for a reversal of the case. But the imaginary, delusive grounds, upon which he bases his invocations, vanish before the scrutiny of approaching law, as does the misty mirage before the piercing rays of a burning sun.

The Appellate Court will not confine its investigation to the probable or real presence of errors, but will consider, if any exist, whether by means thereof the Defendant has sustained *material injury.*

If the record discloses, that substantial justice has been done in the case, the Court will affirm the judgment.

Blackwell *vs.* Patton, 7 Cranch, 471.
Campbell *vs.* Pratt, 2 Pet., 354.
Greenleaf *vs.* Birth, 5 Pet., 132.
Blackburn *vs.* Crawford, 3 Wall, 175.
Thompson *vs.* Roberts, 24 H., 233.
Bromley *vs.* People, 27 Ill., 20.
Chitty's Pleadings, I. Vol., 238.

Having demonstrated, that the instructions to the Jury of the Circuit Court declare the law of the case, and that no material errors appear of record, I do most respectfully submit the Plaintiff's cause to this Honorable Court, with the confident expectation, that the *judgment of the Circuit Court will be affirmed.*

LEWIS UMLAUF,

Attorney for Defendant in Error.

CHICAGO, January, 1869.